REPORT

ON

THE RIGHTS AND RESPONSIBILITIES OF COHABITANTS UNDER THE *FAMILY LAW ACT*

ONTARIO LAW REFORM COMMISSION

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The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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Ontario
Law Reform
Commission

The Honourable Marion Boyd
Attorney General for Ontario

Dear Attorney:

We have the honour to submit our *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act.*

John D. McCamus
Chair

Richard E. B. Simeon
Vice Chair

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Commissioner

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Commissioner

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November 17, 1993

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PREFACE

In 1965, this Commission initiated a research project on family law. The project had the ambitious objective of analyzing all existing laws affecting family relations that fall within provincial jurisdiction in the light of the impact of economic and social changes on the family. The objective was to identify the basic principles of a modern code of family law and suggest appropriate legislation to implement them. The resulting *Report on Family Law* (1969-1974) was released in six parts dealing with: torts, marriage, children, family property law, family courts, and support obligations. This report played a role in sparking legislative interest in family law reform that culminated with the enactment of the *Family Law Act*[1].

Nearly two decades have passed since the Commission last addressed family law. In the intervening years, changes in social mores and the economy have had a dramatic impact on the nature of family life. The most profound change is the increasing diversity of family forms in which individuals choose to live. At the same time, our society's commitment to equality has evolved through the development of human rights jurisprudence and the constitutionalization of rights in the *Canadian Charter of Rights and Freedoms*. The passage of time has brought to light practical difficulties in the implementation of earlier reforms. We believe that, in general, the initial scheme of reform remains valid but that some technical amendments are necessary to ensure that the legislation achieves its objectives. As well, some aspects of family law must be overhauled to reflect contemporary social realities and values.

As part of our new family law reform programme, the Commission is issuing three reports concerning the *Family Law Act*. In the *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act* (1993), we address the need to expand the application of the provisions of the *Family Law Act* to encompass a greater diversity of family forms in which individuals live in intimate relationships characterized by economic interdependence. In the two other reports, we examine special problems that have become apparent in the implementation of the property sharing provisions of the current legislation. In the *Report on Family Property Law* (1993), we propose amendments to the statutory scheme to provide for the sharing of the value of family property between spouses; in the *Report on Pensions as Family Property: Valuation and Division* (1993), we propose reforms to the sharing of a particular type of property that has distinct

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[1] S.O. 1986, c. 4, now R.S.O. 1990, c. F.3.

characteristics and raises special problems—the pension. While we accept that the legislative goal of ensuring that spouses share the product of their joint efforts remains legitimate today, in these two reports we make recommendations designed to improve the fairness and efficiency of the scheme and to ensure that it achieves this objective.

We believe that the problems addressed in these three reports are of particular urgency. At the request of the Attorney General of Ontario, we have endeavoured to prepare these reports quickly. An unfortunate consequence is that we have not had the opportunity to engage in the type of extensive consultation we have undertaken on past projects. We believe, however, that any limitations on consultation are justified by the need to respond rapidly to deficiencies in this area which perhaps affects more citizens directly than any other field of law. We hope that these reports will help to generate and focus public discussion.

We consider the recommendations contained in these reports to be essential to ensure that the law responds adequately to the needs of individuals and protects the integrity of family life. No reform of family law will be "final", however. This area of law touches an aspect of society that is in a constant state of evolution. As a result, its reform is an ongoing task. If, as we would wish, these reports represent an important stage on the path to reform, we acknowledge that they cannot be the last word on the subject.

INTRODUCTION

In this report, the Commission addresses the question: to whom should the rights and obligations set out in the Ontario *Family Law Act*[1] apply? What kinds of relationship should invoke its central provisions concerning the sharing of family property (Part I), the occupation of the matrimonial home (Part II), and the provision of support for spouses (Part III)? Upon what sorts of relationship should the Act confer the capacity to enter into binding domestic contracts (Part IV)? Which family members should be entitled to claim for damages in the event of the death or injury of a partner (Part V)? Our fundamental conclusion is that the ambit of the Act should be expanded to include two kinds of relationship that are today partly or wholly excluded: those between cohabiting heterosexual couples, and those between cohabiting couples of the same sex.

The preamble to the *Family Law Act* sets out its central purposes: to "strengthen the role of the family", "to recognize the equal position of spouses" and to treat their relationship as a "partnership". Hence, the law should provide for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership and provide for other mutual obligations in family relationships. These are fundamental values in our society, which the Commission wishes to endorse and reaffirm.

In the preamble, and throughout much of the Act, "family" is equated with "marriage". The problem we wish to address in this report is whether this should be the case. The major current exception is the imposition of some rights and obligations on heterosexual couples who live together without having been married. Thus, the Act is focused on the traditional model of marriage and provides little room for other forms of relationship that embody the fundamental elements of intimacy, mutual economic interdependence, and living together in a "close personal relationship that is of primary importance in both persons' lives", which we see as the essence of the concept of "family".[2]

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[1] R.S.O. 1990, c. F.3.

[2] This concept is drawn from the *Consent to Treatment Act, 1992*, S.O. 1992, c. 31 (to come into force upon proclamation). This Act includes "partner" as a defined term. A "partner" has the same status as a spouse to give substituted consent to treatment for a person who does not have the capacity to consent. Section 1(2) provides:

> 1.—(2) Two persons are partners for the purpose of this Act if they have lived together for at least one year and have a close personal relationship that is of

We believe that Ontario family law should now recognize and accommodate the increasing diversity of family forms. In particular, heterosexual common-law relationships, which embody virtually all the characteristics of marriage, are becoming more common. We believe that, in these relationships, the need to protect the interests of both parties and to ensure equality and fairness in the event of the breakdown of the relationship is the same as in marriages. Hence, we argue that once a threshold level of permanence has been achieved, the partners in a common-law relationship should be treated under the *Family Law Act* in the same way as married couples.

Family partnerships between gay and lesbian couples are diverse. They have had limited opportunity to evolve in a supportive social climate. While we do not assume that such relationships are necessarily identical to "marriage" (which itself encompasses much diversity in form and practice), we believe that many of these relationships are essentially familial. They embrace the same elements of permanence, intimacy, sharing, and interdependence that characterize heterosexual relationships, and which the *Family Law Act* is designed to support. To the extent that this is so, and to the extent that their exclusion violates anti-discrimination norms of our society, they too should come under the umbrella of the *Family Law Act*.

Thus, in this report, we seek to recognize the role of the family in Ontario life. We do so by broadening the concept of "family" to include a greater diversity of forms and by clarifying our understanding of the nature of the rights and obligations that are entailed in these forms. We believe that in so doing we reinforce society's interest in order and stability, and its need to ensure equity and fairness within relationships. At the same time, we give greater recognition to the variety of choices that individuals make in the ordering of their personal lives. In this report, our focus is largely restricted to spousal relationships, although we propose a new form of partnership that could potentially apply to a broader variety of relationships.

Familial relations necessarily embody both rights and obligations. Primary among these are the right to choose the nature of the relationship and the right to equal treatment under the law. We propose to achieve these goals by broadening the definition of "spouse" in the Act and by introducing the concept of "Registered Domestic Partner". Once registered as Domestic Partners, unmarried couples, whether heterosexual or same-sex, would fall under the rules of the *Family Law Act*.

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primary importance in both persons' lives.

Accompanying these rights are the obligations of spouses to each other, many of which arise in the event of breakdown of the partnership. Our objectives are to provide that when two persons have lived together in a relationship of some permanence, interdependence, and emotional importance to both of them, and that partnership comes to an end, the law should ensure a fair sharing of the assets that they acquired during the time they were together, a fair disposition of the family home and a fair consideration of support if one party is likely to suffer economic hardship as a result of participation in the relationship. The intent is to prevent the economic exploitation of one by the other.

Those who have chosen to marry, or designate their relationship as a Registered Domestic Partnership if our proposals are adopted, voluntarily accept these rights and obligations (subject to any additional contract they may have entered with each other). The matter becomes more complex when they have not assumed expressly these responsibilities. Do the partners in a common-law, ascriptive, or *de facto*, relationship have the same obligations with respect to each other? In the case of heterosexual couples who have lived together in a relationship of interdependence for a considerable period, we have little hesitation in saying "yes". It is likely that one or both partners have assumed that the relationship will be permanent and that the assets they have acquired are likely to be intermingled. For these couples, it is as important as it is for married persons that the assets be shared fairly. Their economic interdependence may have created conditions requiring continued support.

We are more hesitant about making recommendations concerning same-sex couples in this context. On one hand, we believe that the expectations that same-sex partners bring to their relationship may be different from the assumptions made by heterosexual couples and that there may be less likelihood that same-sex couples will encounter the economic inequalities that have been common in traditional heterosexual relationships. These considerations argue for different treatment of the two groups. On the other hand, we see much merit in treating them in the same way—so that economic inequalities and exploitation will be minimized in all familial relationships. However, we believe that better information than the Commission now has before it concerning the attitudes and expectations of cohabiting same-sex couples would be a necessary foundation for any decision to ascribe rights and responsibilities under the *Family Law Act* to such couples. In our view, further consultation with the gay and lesbian community should be undertaken before a decision is made on this issue.

The following chapters describe the legal and policy considerations that shape our recommendations. These proposals are restricted to the *Family Law Act*, although we recognize that a substantial number of other statutes

structure family rights and obligations. It is beyond the scope of this report to examine these other statutes, but we believe that the definitions of spousal and family status found in all provincial legislation should be reviewed. We encourage the government to undertake this task.

Sarah Boulby, a counsel at the Commission, was responsible for the preparation of this report, which is based on a research paper prepared by Professors Brenda Cossman and Bruce Ryder, of Osgoode Hall Law School, York University.[3] The Commission also wishes to acknowledge the comments and criticism of a draft of this report by Professor Winifred H. Holland, of the Faculty of Law, University of Western Ontario and J.J. Morrison, a counsel at the Commission. Finally, the Commission would like to thank Cora Calixterio and Tina Afonso, secretaries at the Commission, and Doreen Potter, the copy editor, for their able assistance with the manuscript.

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[3] *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (June 1993) (a limited number of copies of this paper are available from the Commission upon request).

CHAPTER 1

THE SOCIAL CONTEXT

Canadians live in many different kinds of family. Ideally, legislation concerning family relationships should recognize and accommodate this diversity. In this report we propose to examine the extent to which the *Family Law Act*[1] meets this objective and, where the Act fails to do so, to make recommendations for reforms necessary to achieve it. Before embarking on this project, it is helpful to consider some recent information about the composition of Canadian families.

An overwhelming majority of Canadians live in a family setting. The results of the 1991 census reveal that eighty-three percent of Canadians live in a family that meets the definition used by Statistics Canada.[2] The census defines a family as individuals living with a spouse, parent, or never-married child.[3] According to the definition used by Statistics Canada, seventeen percent of Canadians do not live in a "family" household. In fact, however, only eight percent of Canadians live alone. The percentage who live alone includes many elderly women, and a lesser number of men, who have outlived their spouses.[4] The remaining nine percent of Canadians who do not live in a "family" unit live with others: six percent with non-relatives; two percent in institutions; and one percent with a relative other than a spouse, parent, or never-married child.[5]

These figures identify only those relationships that satisfy the Statistics Canada definition of family. They exclude many relationships that could be defined as families. For example, the six percent of Canadians who live with "non-relatives" include an undetermined number of same-sex couples. As well, the data indicate that one percent of Canadians live with a relative other than a spouse, parent, or never-married child. It is probable that many

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1 R.S.O. 1990, c. F.3.

2 Pina La Novara, "Changes in Family Living" (1993), 29 Can. Soc. Trends 12, at 12.

3 *Ibid.*

4 *Ibid.*, at 13.

5 *Ibid.*, at 13.

of these individuals would regard their relationships as families. Further, the Statistics Canada definition of family is restricted to those who share a household. It excludes all relationships among relatives who do not live under the same roof. As such, the definition of family deviates from a widely accepted meaning of the word.

Despite the limitations of the definition of family used by Statistics Canada, census data do provide much useful information about the households in which Canadians choose to live. Married couples form almost four-fifths of all families recognized by the census, although this proportion had declined slightly in 1991 from the preceding census.[6] The number of unmarried heterosexual couples appears to be increasing, and these now form ten percent of families identified by the census.[7] In part, this increase may reflect the fact that in 1991, for the first time, Statistics Canada asked individuals directly whether they lived in a common-law relationship.[8] A general trend towards increased numbers of Canadians living in common-law relationships appears evident, however.[9] Younger Canadians are more likely to live in common-law relationships than their elders. Such relationships are most common among those between twenty-five and thirty-five years of age.[10] Common-law relationships are also more frequent among those who have recently separated or divorced,[11] although this phenomenon is less evident among those born before 1945.[12] The increased frequency of heterosexual couples choosing to live together outside marriage is too recent for any reliable assessment of the persistence of the trend. The fact that over forty percent of those who reported living in common-law relationships in the early 1980s had married by 1990 suggests, however, that for a sizable minority at least, cohabitation may be a prelude to marriage.[13]

Census data provide no information about same-sex relationships. The census questions presume that those responding have heterosexual identities. As a consequence, we cannot know what proportion of reporting households

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[6] *Ibid.*, at 14.

[7] *Ibid.*, at 13.

[8] *Ibid.*, at 13.

[9] Statistics Canada, *Families in Canada*, by Thomas K. Burch (Ottawa: Supply and Services Canada, March 1990), at 23.

[10] Statistics Canada, Demography Division, *Marriage and Conjugal Life in Canada*[:] *Current Demographic Analysis*, by Jean Dumas and Yves Péron (Ottawa: Minister of Industry, Science & Technology, March 1992), at 98.

[11] *Ibid.*, at 97.

[12] *Ibid.*, at 98.

[13] *Ibid.*, at 100.

are formed by same-sex couples. We also have no firm figures on the number of gay men and lesbians as a percentage of the population. Studies report numbers that vary from four percent to seventeen percent.[14] Nor can we know with any certainty how many lesbians and gay men live together in intimate relationships.[15]

Census figures and accompanying sociological studies of North American society provide some indication of the incidence of non-marital family relationships. While a significant proportion of Canadians marry, these data show that many live in other family forms. For the purposes of this report, which focuses on unmarried heterosexual and same-sex couples, the available information is sufficient to demonstrate that such relationships constitute a sizable minority. Yet the *Family Law Act* does not fully take into account this social fact. Rather, the Act addresses the needs of unmarried heterosexual couples in only some of its provisions, and ignores same-sex couples completely. In the following chapters, we will examine the application of this legislation to unmarried heterosexual and same-sex couples. In analyzing the law and making recommendations for reform, we will strive to accommodate appropriately the social context described in this chapter.

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[14] John C. Gonsiorek and James D. Weinrich (eds.), *Homosexuality*[:] *Research Implications for Public Policy* (Newbury Park, Cal.: Sage, 1991), at 3-11.

[15] Recent American studies indicate that an estimated 60% of lesbian women and 40% of gay men are involved in intimate relationships: Letitia Anne Peplau and Susan D. Cochran, "A Relationship Perspective on Homosexuality", in David P. McWhirter *et al.* (eds.), *Homosexuality/Heterosexuality*[:] *Concepts of Sexual Orientation* (New York: Oxford University Press, 1990) 321, at 332; Warren J. Blumenfeld and Diane Raymond, *Looking at Gay and Lesbian Life* (New York: Philosophical Library, 1988), at 374; Letitia Anne Peplau, "Lesbian and Gay Relationships", in John C. Gonsiorek and James D. Weinrich (eds.), *Homosexuality*[:] *Research Implications for Public Policy* (Newbury Park Cal.: Sage, 1991) 177, at 179-80. Estimates of the incidence of lesbian relationships vary widely, from 45% to 80%. Thirty-six percent of gay and bisexual men surveyed in a Canadian study reported that they were in an intimate relationship with another man (approximately one-half in monogamous and one-half in non-monogamous relationships): Canadian AIDS Society, *The Canadian Survey of Gay and Bisexual Men and HIV Infection*[:] *Men's Survey*, by Ted Myers *et al.* (1993), at 28-30. The University of Toronto, Université Laval and Université de Montréal collaborated with the Canadian AIDS Society in preparing this study. No comparable Canadian study examines the incidence of lesbian relationships.

CHAPTER 2

UNMARRIED HETEROSEXUAL COUPLES

1. THE CURRENT LAW

(a) THE *FAMILY LAW ACT*

Many relationships among family members have economic consequences. In recognition of this fact, provincial law creates mutual rights and responsibilities that apply to immediate family members: spouses, parents, and children. The *Family Law Act*[1] contains more than one definition of spouse. "Spouse" refers to married persons throughout the statute; however unmarried heterosexual couples, as defined by the statute, are treated as spouses in some parts of the Act.[2] Common-law spouses bear a mutual obligation of support (Part III) and have the right to enter domestic contracts, under the auspices of the Act, to govern their affairs (Part IV). A common-law spouse also has status to bring a claim for dependant's relief in tort in the event of the death or injury of the other (Part V). Married

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[1] R.S.O. 1990, c. F.3.

[2] Unmarried heterosexual couples are treated as spouses for some purposes of the *Family Law Act*, *ibid.*, if they satisfy this definition:

> 29. In this Part,
>
> ....
>
> "spouse"...includes either of a man and woman who are not married to each other and have cohabited,
>
> (a) continuously for a period of not less than three years, or
>
> (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

"Cohabit" is a defined term in the Act:

> 1.—(1) In this Act
>
> ....
>
> "cohabit" means to live together in a conjugal relationship, whether within or outside marriage;

spouses have additional statutory rights that are denied common-law spouses. A husband or wife may apply for an equal share of wealth generated during the marriage, and of the matrimonial home (Part I).[3] Both married spouses have a right to possession of the home that they share, irrespective of who owns the property (Part II).[4] As well, under Part II, the rights of the owner of the matrimonial home to sell or encumber the property without the agreement of the other spouse are severely restricted.[5]

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[3] In the companion *Report on Family Property Law* (1993), we recommend reforms to improve the efficiency and fairness of the property equalization rules. In particular, we recommend that the value of the family home be shared only to the extent that it was acquired during the marriage.

[4] Courts and commentators are divided on whether common-law spouses have statutory possessory rights in their home indirectly through the support obligation. The debate arises because Part III of the *Family Law Act*, *supra*, note 1, provides that a court may make an order regarding possession of the matrimonial home to satisfy a support obligation (ss. 34(1)(d)). In *Young-Foong v. Leong-Foong* (1980), 1 F.L.R.A.C. 718 (Ont. Master), aff'd (1980), 1 F.L.R.A.C. 718, at 721 (Ont. H.C.J.), a court interpreting a similar provision of the predecessor legislation, the *Family Law Reform Act*, R.S.O. 1980, c. 152, held that a common-law spouse could benefit from an order for exclusive possession of the home if necessary to satisfy a support obligation. In *Czora v. Lonergan* (1987), 59 O.R. (2d) 402, 7 R.F.L. (3d) 458 (Dist. Ct.), the court came to the opposite conclusion when interpreting the current Act. In support of this result, the court noted that a common-law spouse could not, by definition, have a matrimonial home. As well, an indication that the drafters of the statute did not intend common-law spouses to have possessory rights is the fact that Part IV provides expressly that married spouses may not contract out of these rights in s. 52(2). There is no such restriction on the ability of common-law spouses to contract out of Part II. Berend Hovius and Timothy G. Youdan endorse the result in *Czora v. Lonergan*, *supra*, in *The Law of Family Property* (Toronto: Carswell, 1991), at 581. Nicholas Bala and Marlene Cano argue to the contrary in "Unmarried Cohabitation in Canada: Common Law and Civilian Approaches to Living Together" (1989), 4 Can. Fam. L.Q. 147, at 184-85.

[5] The situation in other Canadian jurisdictions is as follows. No province grants unmarried heterosexual couples rights to share in family property. Although in 1979 the New Brunswick government introduced a Bill to grant property rights to heterosexual couples who cohabited for at least three years, the government dropped this section of the Bill in the face of strong opposition: Winifred H. Holland and Barbro E. Stalbecker-Pountney (eds.), *Cohabitation: The Law in Canada* (Toronto: Carswell, looseleaf), at 2-4. Manitoba provides express possessory rights in the family residence for cohabitants who have lived together for at least a year if they are the parents of a child or otherwise if they have lived together for five years: *The Family Maintenance Act*, R.S.M. 1987, c. F-20, s. 14(1). No other province grants possessory rights to common-law spouses. Mutual support obligations are imposed on unmarried heterosexual couples in Nova Scotia: *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 2(m); British Columbia: *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 1 "spouse "(c), Manitoba: *The Family Maintenance Act*, *supra*, s. 4(3)); New Brunswick: *Family Services Act*, R.S.N.B. 1980, c. F—22, s. 112(3); Newfoundland: *Family Law Act* R.S.N. 1990, c. F-2, ss. 35(c), 36; Saskatchewan: *Family Maintenance Act*, S.S. 1990-91, c. F—6.1, s. 2(l)(iii); and the Yukon (*Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 35). The Alberta Law Reform Institute has recommended the introduction of a limited support obligation between cohabitants, but the province of Alberta has not yet acted on this advice: *Towards Reform of the Law relating to Cohabitation outside Marriage* (1989). Cohabitation contracts between common-law couples were formerly regarded as invalid on public policy grounds: see *Fender v. St. John-Mildmay*, [1938] A.C. 1, [1937] 3 All E.R. 40 (H.L.). More recently courts have

(b) The Common Law

Although common-law spouses do not enjoy the statutory rights to share in the value of family property available to married spouses, they do have access to common law remedies that apply irrespective of the nature of their relationship. A common-law spouse who has contributed, directly or indirectly, to the acquisition, maintenance, or preservation of an asset held in the name of the other spouse may seek restitution for her efforts, according to the doctrine of unjust enrichment.[6] If the spouse succeeds in establishing the elements of a claim of unjust enrichment, the court will award either monetary compensation for the contribution or a beneficial

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found these contracts to be valid: see *Chrispen v. Topham* (1986), 48 Sask. R. 106, 3 R.F.L. (3d) 149 (Q.B.), aff'd (1987), 59 Sask. R. 145, 9 R.F.L. (3d) 131 (C.A.). Legislation in five jurisdictions expressly makes cohabitation contracts enforceable: New Brunswick: *Marital Property Act*, S.N.B. 1980, c. M—1.1, s. 34; Newfoundland: *Family Law Act*, *supra*, Part IV; Prince Edward Island: *Family Law Reform Act*, R.S.P.E.I. 1988, c. F—3, s. 45; Quebec: *An Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c. 39, s. 35; and the Yukon: *Family Property and Support Act*, *supra*, s. 58.

Some international jurisdictions have granted cohabitees statutory rights. In Sweden, a statute grants limited rights in property to unmarried heterosexual and same-sex cohabitants, but no support rights: *Cohabitees (Joint Homes) Act*, S.F.S. 1987:232, as am. S.F.S. 1987:814. For comment, see David Bradley, "Radical Principles and the Legal Institution of Marriage: Domestic Relations Law and Social Democracy in Sweden" (1990), 4 Int'l. J.L. & Fam. 154; David Bradley, "The Development of a Legal Status for Unmarried Cohabitation in Sweden" (1989), 18 Anglo-Am. L. Rev. 322; and Matthew Fawcett, "Taking the Middle Path: Recent Swedish Legislation Grants Minimal Property Rights to Unmarried Cohabitants" (1990), 24 Fam. L.Q. 179. Three Australian jurisdictions have recently considered this issue. New South Wales passed the *De Facto Relationships Act* in 1984 which provides for support rights and property rights based on a principle of compensation (this is narrower than the provision for married spouses). This Act closely follows the recommendations of the New South Wales Law Reform Commission's *Report on De Facto Relationships* (Report No. 36) (June 1983). In Victoria, the state enacted legislation that grants property rights only, *Property Law (Amendment) Act* 1987 (Vic.). For comment, see Dorothy Kovacs, "*De facto* property rights in Victoria" (1990), 64 Law Inst. J. 159. The Queensland Law Reform Commission has proposed that both heterosexual and same-sex cohabitants should have property rights comparable to those provided for married spouses, and support rights only if a *de facto* partner suffers from an inability to support himself that arises from the relationship: see *De Facto Relationships* (Working Paper 40) (1992). The state government has not, as yet, acted on these recommendations.

[6] The Supreme Court of Canada adopted the doctrine of unjust enrichment in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165 (subsequent references are to [1980] 2 S.C.R.). Dickson J. identified three elements in the principle: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment (at 848) and held that (at 849):

> [W]here one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

interest in the contested asset. The court will grant a proprietary remedy only if the claimant can demonstrate a clear link between the contribution made and the asset in question. The remedy will reflect the value of the contribution. If the court determines that monetary compensation is appropriate, the amount will reflect the value of the services or benefits conferred by the contributing spouse. If the court finds that a proprietary remedy is appropriate, the size of the interest awarded in an asset will reflect the value added to the respondent's assets by the efforts of the contributing spouse.[7]

An unmarried spouse may have occupation rights in the family home at common law. Canadian courts have not recognized such rights in any reported case, but the English Court of Appeal has recognized a right of occupation pursuant to the doctrine of contractual licence.[8] In the leading case, the Court of Appeal characterized the claimant's surrender of a rent-controlled apartment in order to move in with the other spouse as consideration for the contractual licence to occupy the family home.

2. THE NEED FOR REFORM

(a) THE PARAMETERS OF ANTI-DISCRIMINATION LAW

Under the *Family Law Act*, unmarried heterosexual couples have fewer mutual rights and responsibilities than married couples. Does this different treatment constitute legal discrimination? There are two sources of anti-discrimination law in Ontario: the *Human Rights Code*[9] and the *Canadian Charter of Rights and Freedoms*.[10] The *Human Rights Code* protects citizens

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[7] *Peter v. Beblow*, [1993] 1 S.C.R. 980, at 999, 101 D.L.R. (4th) 621, at 651-52, *per* McLachlin J. (subsequent references are to [1993] 1 S.C.R.). For a more detailed discussion of the doctrine of unjust enrichment and its application to domestic property disputes, see ch. 2 of the companion Ontario Law Reform Commission *Report on Family Property Law* (1993).

[8] *Tanner v. Tanner*, [1975] 3 All E.R. 776 (C.A.). In *Chandler v. Kerley*, [1978] 2 All E.R. 942, the English Court of Appeal held that a spouse could terminate a contractual licence of occupation on reasonable notice. For a decision in which the Court of Appeal rejected a claim for a contractual licence, see *Horrocks v. Forray*, [1976] 1 All E.R. 737. For a further discussion of these cases, see Hovius and Youdan, *supra*, note 4, at 181-84. A New York court awarded a cohabitee interim possession of the family home on an "implied contract". The court found that the cohabitee had provided consideration for the contract by quitting her job in order to provide domestic services: *McCullon v. McCullon*, 410 N.Y.S. 2d 226 (N.Y.Sup. 1978).

[9] R.S.O. 1990, c. H.19 (hereinafter referred to as the "Code").

[10] Hereinafter referred to as the "Charter".

from discrimination in the provision of services, goods, and facilities.[11] The Code has primacy over other provincial legislation.[12] The Charter grants a constitutional right of equality to all Canadians.[13] Charter rights are part of the supreme law of Canada. Any law that is inconsistent with the provisions of the Charter is, to that extent, of no force or effect.[14]

The constitutional right of equality is of more significance for this discussion, since the *Family Law Act* is clearly subject to the terms of the Charter, while the *Human Rights Code* does not apply to the *Family Law Act*. The Code has a restricted application, covering the provision of goods, services, and facilities, employment, and accommodation. The rights and obligations imposed by the *Family Law Act* do not appear to fall into any of these categories. The Code is relevant to this discussion, however, as a

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[11] Code, *supra*, note 9, s. 1 provides:

> 1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

Sections 2-9 prohibit discrimination in the provision of accommodation and employment and in vocational associations.

[12] Code, *supra*, note 9, s. 47(2) provides:

> (2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

For judicial consideration of this section, see *Hickling v. The Lanark, Catholic School Board* (1986), 7 C.H.R.R. D/3546 (Ont. Bd. of Inquiry), rev'd (1987), 60 O.R. (2d) 441, 40 D.L.R. (4th) 316 (Div. Ct.), aff'd (1989), 67 O.R. (2d) 479*n*, 57 D.L.R. (4th) 479*n* (C.A.); and *Re Joseph and College of Nurses of Ontario* (1985), 51 O.R. (2d) 155, 19 D.L.R. (4th) 214 (Div. Ct.). The Supreme Court of Canada has recognized that human rights legislation has *quasi*-constitutional status: *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, 21 D.L.R. (4th) 1; *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, 137 D.L.R. (3d) 219; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321; *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193 ("Action Travail des Femmes"); and *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

[13] Charter, s. 15.

[14] The *Constitution Act*, 1982 provides:

> 52.—(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

legislative expression of fundamental values of our society. The preamble to the Code states that:[15]

> [R]ecognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> [and]
>
> [I]t is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province...

Human rights jurisprudence is also relevant because a cross-pollination has occurred between the interpretation of human rights legislation and the equality guarantees of the Charter. The *Human Rights Code* is subject to the Charter.[16] At the same time, courts have relied on human rights jurisprudence as a guide to interpreting constitutional equality rights.[17] Because of the close relationship between human rights and constitutional equality jurisprudence, and because both are statements of fundamental values of our society, we have decided to consider each in this report.

(i) Human Rights Jurisprudence

Unmarried heterosexual couples receive express protection in the *Human Rights Code*, which prohibits marital-status discrimination.[18]

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[15] Code, *supra*, note 9.

[16] See, for example, *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545; *Haig v. Canada* (1992), 9 O.R. (3d) 495, 94 D.L.R. (4th) 1 (C.A.); and *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. 513, 26 D.L.R. (4th) 728 (C.A.).

[17] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 (subsequent references are to [1989] 1 S.C.R.).

[18] Code, *supra*, note 9, s. 1.

Discrimination on this ground is also prohibited by human rights legislation in every other Canadian jurisdiction.[19] The Code defines "marital status" as follows:

> 10.—(1) In Part I and in this Part,
>
> ....
>
> "marital status" means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage;

In two recent decisions, Ontario boards of inquiry have held that this definition discriminates on the grounds of sexual orientation by excluding from its terms those who live with a member of the same sex in a conjugal relationship.[20] We will discuss the implications of these decisions in chapter 3 of this report.

The statutory prohibition of discrimination on the grounds of marital status protects individuals from differential treatment on the basis of status when it is an irrelevant factor. Marital-status discrimination takes many forms.[21] In *Schaap v. Canada*, Hugesson J.A. of the Federal Court of Appeal explained the purpose of the prohibition of marital status discrimination:[22]

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19 See *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3(1); *Fair Practices Act*, R.S.N.W.T. 1988, c. F-2, preamble; *Human Rights Act*, R.S.Y. 1986, c. 11 (Supp.), as am. by S.Y. 1987, c. 3, s. 4(1); *Human Rights Act*, S.B.C. 1984, c. 22, Part I; *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, s. 7(1) (with respect to employment); *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, as am. by S.S. 1989-90, c. 23, s. 12(1); *Human Rights Code*, S.M. 1987-88, c. 45, Part I; *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 10 ("civil status"); *Human Rights Act*, R.S.N.B. 1973, c. H-11, preamble; *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 12(2); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, preamble; and *Human Rights Code*, R.S.N. 1990, c. H-14, s. 6(1).

20 *Leshner v. Ontario (No. 2)* (1992), 16 C.H.R.R. D/184 (Ont. Bd. of Inquiry) (the respondent Government of Ontario chose not to appeal this decision) and *Clinton v. Ontario Blue Cross*, unreported (July 14, 1993, Ont. Bd. of Inquiry) (the respondent company will appeal this decision).

21 See, for example, *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, 53 D.L.R. (4th) 609; *Cashin v. Canadian Broadcasting Corp.*, [1988] 3 F.C. 494, 86 N.R. 24 (C.A.); *Bosi v. Township of Michipicoten* (1983), 4 C.H.R.R. D/1252, 83 C.L.L.C. ¶17,006 (Ont. Bd. of Inquiry); *Mark v. Porcupine General Hospital* (1985), 6 C.H.R.R. D/2583, 85 C.L.L.C. ¶17,001 (Ont. Bd. of Inquiry); *Schaap v. Canadian Armed Forces (C.A.)* (1988), [1989] 3 F.C. 172, 56 D.L.R. (4th) 105 (C.A.) (subsequent references are to [1989] 3 F.C.); *Fraser v. Dial Agencies* (1980), 1 C.H.R.R. D/245 (Sask. Bd. of Inquiry); and *Canada (Attorney General) v. Druken* (1988), [1989] 2 F.C. 24, 9 C.H.R.R. D/5359 (C.A.).

22 *Ibid.*, at 182-83.

> I do not think the purpose of the human rights legislation is to favour the institution of marriage (or, for that matter, that of celibacy). On the contrary, I think the legislation, by including marital status as a prohibited ground of discrimination along with such factors as race, ethnic origin, colour, disability, and the like, is clearly saying that these are all things which are irrelevant to any of the types of decisions envisaged.... Those decisions are to be made on the basis of individual worth or qualities and not of group stereotypes.

Differential treatment on the basis of marital status is acceptable only if that status is relevant to the issue at hand. Human rights complaints have failed in cases in which the respondent demonstrated a *bona fide* reason for taking marital status into account.[23]

For our purposes, it is sufficient to note the rationale for prohibiting this type of discrimination under the Code. It is to ensure that individuals do not receive differential treatment based on an irrelevant consideration: their marital status. The prohibition is directed at policies and practices that reflect stereotypical assumptions about the role of married women and the social stigma traditionally attached to cohabiting unmarried couples and unwed parents. Although the Code does not apply to provisions of the *Family Law Act*, the rationale for barring marital-status discrimination has symbolic importance as an expression of Ontario public policy. It prompts us to question the exclusion of unmarried heterosexual couples from a significant number of the rights and obligations provided in the *Family Law Act*.

(ii) Equality Rights Jurisprudence

The constitutional rights of equality protected in section 15 of the Charter do apply to the provisions of the *Family Law Act*. The provision states:

> 15.—(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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[23] For example, in *Caldwell v. Stuart*, [1984] 2 S.C.R. 603, 15 D.L.R. (4th) 1, the Court held that the denial of an employment opportunity by a Catholic school to a teacher who had married a divorced non-Catholic was not prohibited. In *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, *supra*, note 12, the Court held that higher automobile insurance rates for young unmarried men is not prohibited by the Code, *supra*, note 9, because the respondent adduced sufficient evidence that age, sex, and marital status were relevant to the setting of insurance rates.

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 protects individuals from discrimination on the basis of listed and analogous grounds.[24] In the first Supreme Court of Canada decision to consider the application of section 15, *Andrews v. Law Society of British Columbia*, McIntyre J. defined discrimination as follows:[25]

> [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

In a subsequent case, *R. v. Turpin*,[26] Wilson J. identified the purpose of section 15 as "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society". Her reasons refer to "indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice".[27] The presence, or absence, of these factors indicates whether a ground of distinction is prohibited under section 15.

Members of the Court have also employed other language when attempting to capture the types of discrimination addressed by section 15. In *Andrews v. Law Society of British Columbia*,[28] McIntyre J. observed that the right protects members of a "discrete and insular minority", borrowing this phrase from American constitutional jurisprudence. Some have questioned the usefulness of this phrase. It appears to exclude some groups that have suffered disadvantage historically, most obviously women, who form a majority of the population and whose rights are protected in a listed

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[24] *Andrews v. Law Society of British Columbia*, *supra*, note 17, at 182.

[25] *Ibid.*, at 174.

[26] [1989] 1 S.C.R. 1296, at 1333, 96 N.R. 115, at 161 (subsequent references are to [1989] 1 S.C.R.).

[27] *Ibid.*

[28] *Supra*, note 17, at 183, referring to *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), at 152-53, n. 4, aff'd in *Graham v. Richardson*, 403 U.S. 365 (1971), at 372.

ground.[29] In his concurring reasons in *Andrews v. Law Society of British Columbia*,[30] La Forest J. introduced another concept, arguing that the ground of discrimination in question in that case, citizenship, falls within the purview of section 15 because it is a personal characteristic that is "immutable" in the sense that it is "not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs". La Forest J. does not appear to use "immutable" in the strict sense of "unchangeable". Clearly citizenship is changeable, as is religion, which is a listed ground. Rather, La Forest J. restricts the meaning of the word to refer to changes that would impose "unacceptable costs". Discrimination on the basis of a personal characteristic that the subject could conceivably alter, such as an individual's religious affiliation or citizenship, appears to fall within the scope of section 15 because, if the state were to impose such a change, that individual's conscience or personal integrity would be violated.[31]

Given this interpretation of section 15, does treating unmarried heterosexual couples differently from married couples constitute discrimination? Although marital status is not listed expressly in section 15, there are strong arguments to support a finding that it is an analogous ground. In the year that section 15 came into effect, the Parliamentary Committee on Equality Rights[32] concluded that the Charter implicitly prohibits marital-status discrimination. The Ontario government acknowledged that section 15 covers marital-status discrimination when it extended the definition of spouse in over thirty statutes to include unmarried heterosexual couples, in an omnibus Bill designed to make these laws comply with the Charter.[33] Several academic commentators argue that marital-status

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29 See the comments of Dale Gibson, "Analogous Grounds of Discrimination under the Canadian Charter: Too Much Ado about Next to Nothing" (1991), 29 Alta. L. Rev. 772, at 783. Gibson argues that the phrase, with its suggestion of ghetto-ization, derives from the social context of the time in which it was coined—the 1930s. He suggests that the idea is better captured by the label "prior group disadvantage" (at 785).

30 *Supra*, note 17, at 195.

31 See the discussion of the meaning of "immutability" in Gibson, *supra*, note 29, at 786-88.

32 Canada, House of Commons, *Equality for All* (Report) (Chair: J. Patrick Boyer) (Ottawa: Supply & Services Canada, October 1985), at 34.

33 *Equality Rights Statute Law Amendment Act, 1986*, S.O. 1986, c.64. The Act failed to amend the definition of "spouse" in the *Family Law Act*, *supra*, note 1, or the *Succession Law Reform Act*, R.S.O 1990, c. S.26, among others.

distinctions constitute discrimination under section 15[34] and many courts have taken this view.[35]

In two recent companion cases, *Leroux v. Co-Operators General Insurance Co.*[36] and *Miron v. Trudel*,[37] the Ontario Court of Appeal came to the contrary conclusion, holding that marital status is not an analogous ground of discrimination under section 15. The Supreme Court of Canada has granted leave to appeal in the latter case.[38] In both *Leroux* and *Miron*,

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[34] See Shelagh Day, "The Charter and Family Law", in Elizabeth Sloss (ed.), *Family Law in Canada: New Directions* (Ottawa: Canadian Advisory Council on the Status of Women, November 1985); Gibson, *supra*, note 29, at 784-85; Catherine L. Jones, "Marital Status—Can it Ever Be an 'Analogous Ground' under S. 15 of the Charter?" (1992), 14 Adv. Q. 282; Gary S. Joseph, "Section 15 of the Charter—Equality Rights and Marital Status Discrimination: Rights of the Unmarried Cohabitant Upon Breakdown of the Relationship" (1990), 26 R.F.L. (3d) 235; and A. Anne McLellan, "Marital Status and Equality Rights", in Anne F. Bayefsky and Mary Eberts (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985), 411.

[35] See *B.(L.M.) v. H.(T.)* (1987), 58 Sask. R. 212, [1987] 5 W.W.R. 55 (Q.B.) (filiation proceedings); *R. v. Bezeau* (1991), 9 C.R.R. (2d) D—1 (Ont. Prov. Div.) (spousal testimony); *Stehwien v. Webb* (1988), 73 Sask. R. 1 (Q.B.), 18 R.F.L. (3d) 138 (unmarried woman seeking child support); *Christante v. Schmitz*, (1990) 83 Sask. R. 60, 25 R.F.L. 378 (Q.B.) (support of children born outside of marriage); *Cowling v. Brown* (1989), 48 C.R.R. 205 (B.C. Co. Ct.); *Cowling v. Brown* (1990), 48 B.C.L.R. (2d) 63, (1990), 71 D.L.R. (4th) 713 (C.A.); *Penner v. Danbrook* (1992), 39 R.F.L. (3d) 286, [1992] 4 W.W.R. 385 (Sask. C.A.); *Goldstein v. Canada (Minister of Employment and Immigration)* (1988), 65 O.R. (2d) 72, 51 D.L.R. (4th) 583 (H.C.J.) (unemployment insurance); *McKinley v. M.N.R.*, unreported (November 9, 1987, T.C.C.) (unemployment insurance); *Milne v. Alta. (A.G.)* (1990), 75 Alta. L.R. (2d) 155, 74 D.L.R. (4th) 403 (Q.B.) (support of children born outside of marriage); *Re MacVicar and Superintendent of Family and Child Services* (1986), 34 D.L.R. (4th) 488, 29 C.R.R. 37 (B.C.S.C.) (adoption of children born outside of marriage); *Matheson v. Matheson* (1988), 31 B.C.L.R. (2d) 73 (S.C.), rev'd on consent (1989), 43 B.C.L.R. (2d) 117, 40 C.C.L.I. 300 (C.A.) (spousal tort immunity discriminates on the basis of marital status); *M.(N.) v. Superintendent of Family and Child Services* (1986), 10 B.C.L.R. (2d) 234, 34 D.L.R. (4th) 488 (S.C.) (adoption of children born outside marriage); *Panko v. Vandesype* (1993), 101 D.L.R. (4th) 726, 45 R.F.L. (3d) 424 (Sask. Q.B.) (support of children born outside of marriage); *Gorzen v. Litz* (1988), 66 Sask. R. 211, 50 D.L.R. (4th) 758 (C.A.) (testimony of unmarried mothers in paternity proceedings); *R. v. Duvivier* (1990), 75 O.R. (2d) 203, 60 C.C.C. (3d) 353 (H.C.J.), aff'd *sub nom R. v. Johnson* (1991), 3 O.R. (3d) 49, 64 C.C.C. (3d) 20 (C.A.) (spousal testimony); *Schachtschneider v. Canada* (No. 91-1006 (IT)), unreported (November 6, 1991, T.C.C.) (marital status distinctions in *Income Tax Act*); *Skalbania (Trustee of) v. Wedgewood Village Estates Ltd.*, (1989), 37 B.C.L.R. (2d) 88, 60 D.L.R. (4th) 43 (C.A.), leave to appeal to S.C.C. refused (1989), 40 B.C.L.R. (2d) xxxiii (note), 62 D.L.R. (4th) viii (note) (arm's length provision of *Bankruptcy Act*, R.S.C. 1970, c. B-3, upheld); *Surette v. Harris (Estate)* (1989), 91 N.S.R. (2d) 418 43 C.R.R. 22 (T.D.) (intestacy legislation); and *D.S.W. v. R.H.* (1988), 71 Sask. R. 66, 55 D.L.R. (4th) 720 (C.A.), leave to appeal to S.C.C. refused (1989), 76 Sask. R. 57*n*, 62 D.L.R. (4th) viii (support of children born outside of marriage).

[36] (1991), 4 O.R. (3d) 609, 83 D.L.R. (4th) 694 (C.A.) (subsequent references are to 4 O.R. (3d)) (hereinafter referred to as "*Leroux*").

[37] (1991), 4 O.R. (3d) 623, 83 D.L.R. (4th) 766 (C.A.) (hereinafter referred to as "*Miron*").

[38] (1992), 8 O.R. (3d) xiii (note), 90 D.L.R. (4th) viii (note) (S.C.C.).

the applicants argued that the definition of "spouse" in automobile insurance policies issued under the terms of the *Insurance Act*[39] must encompass unmarried heterosexual cohabitants. The Act does not provide a definition of "spouse", but the Court of Appeal had previously affirmed a decision that interpreted the term to include only married persons.[40] In that decision, however, the parties had not questioned the constitutional validity of a restrictive definition of spouse. The issue was squarely raised, however, in *Leroux* and *Miron*.

The Court of Appeal rehearsed their substantive reasons for denying both claims in *Leroux*. Accordingly, we will consider that decision in detail.

In *Leroux*, the Court of Appeal held that marital status is not an analogous ground of discrimination under section 15 of the Charter, overturning the decision of Arbour J., below.[41] In reaching this conclusion, the Court of Appeal considered the factors suggested by the Supreme Court of Canada as indicators that a distinction falls within the meaning of discrimination under section 15. The court found that common-law spouses could not be characterized as a disadvantaged group, a "discrete and insular minority", or a group that had suffered social, political, and legal disadvantage. In particular, the Court of Appeal observed that while common-law spouses do not possess all the legal rights of married couples, they also are not subject to the corresponding obligations.[42] The court also held that marital status fails the test of "immutability". The court described this factor as an important feature of many of the listed grounds of discrimination under section 15, although not an essential one.[43] Finally, the Court of Appeal noted the existence of practical difficulties in defining common-law relationships and suggested that some of the existing statutory definitions of common-law spouse appear unconstitutional as too restrictive.[44]

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39 R.S.O. 1980, c. 218.

40 *Fraser v. Haight* (1987), 58 O.R. (2d) 676, 36 D.L.R. (4th) 459 (H.C.J.) aff'd (1989), 69 O.R. (2d) 64*n*, 58 D.L.R. (4th) 540*n* (C.A.).

41 *Leroux v. Co-operators General Insurance Co.* (1990), 71 O.R. (2d) 641, 65 D.L.R. (4th) 702 (H.C.J.) (subsequent references are to 71 O.R. (2d)) (hereinafter referred to as "*Leroux* (H.C.J.)").

42 *Leroux*, *supra*, note 36, at 620-21.

43 *Ibid.*, at 621.

44 *Ibid.*, at 622. Arbour J. in *Leroux* (H.C.J.), *supra*, note 41, at 655, referred to the definitions of spouse found in other parts of the *Insurance Act*, *supra*, note 39, ("spouse" includes an unmarried couple who have cohabited continuously for at least five years or who have a child and have cohabited in the previous year); Part III of the *Family Law Act, 1986*, S.O. 1986, c. 4 ("spouse" includes either a man or a woman who have cohabited continuously for three years or who are in a relationship of some permanence

The decision of the Court of Appeal in *Leroux* is open to question. In *Andrews v. Law Society of British Columbia*,[45] Wilson J. observed that the determination of whether a group falls within an analogous category to the listed grounds in section 15 must be made "in the context of the place of the group in the entire social, political and legal fabric of our society". In *R. v. Turpin*,[46] Madam Justice Wilson, writing for the court, repeated this injunction. Yet in *Leroux*, the Court of Appeal found unpersuasive the argument that common-law spouses form an historically disadvantaged group and failed to consider the broader social context as it affects the experience of unmarried couples. Essentially, the Court considered the discrimination claim against the background of current legislative treatment of unmarried couples. The Court ignored the stigma historically attached to unmarried couples in our society and did not address the significance of the recognition of marital status as a ground of discrimination in federal and provincial human rights statutes, and in the International Convention on the Elimination of all Forms of Discrimination against Women, to which Canada is a signatory. In the court below, Madam Justice Arbour had referred to the prohibition of marital-status discrimination in domestic human-rights legislation. She had also cited Article 1 of the International Convention, which states:[47]

> For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The Convention draws a link between marital-status discrimination and sex discrimination, thus supporting the claim that the former is an analogous ground under section 15.

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if they are the natural or adoptive parents of a child); and the *Workers' Compensation Act*, R.S.O. 1980, c. 539 ("spouse" includes either a man and woman who had cohabited for at least one year, were together parents of a child, or had entered into a cohabitation agreement under s. 53 of the *Family Law Act, 1986*).

[45] *Andrews v. Law Society of British Columbia*, *supra*, note 17, at 152.

[46] *Supra*, note 26, at 1332. See, also, *R. v. Swain*, [1991] 1 S.C.R. 933, at 992, 125 N.R. 1, at 62, *per* Lamer C.J.C..

[47] Article 1 of the International Convention on the Elimination of All Forms of Discrimination against Women, UNGA Res. 34/80, GAOR, 34th Sess., Supp. 46, p. 193; 19 ILM 33, cited in Anne F. Bayefsky, "Defining Equality Rights", in Anne F. Bayefsky and Mary Eberts (eds.) *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 1, at 27-28, cited *Leroux* (H.C.J.), *supra*, note 41, at 652.

The Court of Appeal's consideration of the "immutability" of an individual's marital status may also be questioned. In quoting the words of La Forest J. in *Andrews v. Law Society of British Columbia*,[48] the Court of Appeal omitted his qualification—a characteristic is immutable if it cannot be altered without an unacceptable cost.[49] Arguably, marriage may impose an unacceptable cost on some individuals. People choose whether or not to marry for diverse reasons. The decision may reflect a political choice or the existence of religious constraints. Similarly, an individual's decision to remain single or to divorce may not be alterable without unacceptable cost to personal integrity and convictions. Arguably, then, marital status could be considered to be "immutable" in the sense employed by La Forest J.

The analysis in *Leroux* does not address the factor that the Supreme Court of Canada has identified as the core of the equality right—the prohibition of discrimination on the basis of "irrelevant personal characteristics".[50] The judgment does not include a discussion of the purpose of the extension of insurance protection to spouses of the policy holder by the *Insurance Act*.[51] The Court of Appeal does not ask: Is the existence of a marriage certificate relevant to the object of the legislation?

For reasons such as these, we are inclined to assume, for present purposes, that the Court of Appeal's reasons in this case are unlikely to be upheld on appeal.

If the Supreme Court of Canada should find that marital-status discrimination is an analogous ground, the constitutionality of the definition of spouse in the *Family Law Act* would be brought into serious question. Unmarried heterosexual couples are now included in the definition of spouse under some sections of the Act, namely, those imposing mutual support obligations and those governing domestic contracts. They are excluded, however, from the equalization of wealth scheme in Part I and the special provisions regarding the matrimonial home in Part II. Such a distinction would be difficult to defend. While unmarried heterosexual spouses have some common-law rights to property ownership, and perhaps to possession

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48 *Supra*, note 17.

49 *Leroux*, *supra*, note 36, at 621.

50 *Andrews v. Law Society of British Columbia*, *supra*, note 17, at 193. La Forest J. commented:

> [T]he relevant question as I see it is restricted to whether the impugned provision amounts to discrimination in the sense in which my colleague has defined it, i.e., on the basis of 'irrelevant personal differences' such as those listed in s. 15 and, traditionally, in human rights legislation.

51 *Supra*, note 39.

of the family home, these rights are far less extensive than the statutory regime and are more difficult and expensive to exercise.

The *Family Law Act*'s special provisions for sharing property between married spouses recognize that marriage is an economic partnership. In the context of remedial constructive trust cases, the Supreme Court of Canada has indicated that the economic relationship of unmarried heterosexual couples is comparable to that of married couples. For example, in *Pettkus v. Becker*,[52] Dickson J. found "no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period". In *Peter v. Beblow*,[53] Madame Justice McLachlin characterized the exclusion of unmarried couples from the right to claim an interest in matrimonial assets under British Columbia's family property legislation as an "injustice".

If the courts should accept the argument that the exclusion of unmarried heterosexual couples from Parts I and II of the *Family Law Act* breaches section 15, the government would have the burden of demonstrating that the breach is a reasonable limit under section 1 of the Charter. Section 1 provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court of Canada set out the fundamental test for applying section 1 in *R. v. Oakes*.[54] To justify a legislative infringement of a Charter right, the state must demonstrate that there is a pressing and substantial objective and that the restriction is proportionate to that objective. A measure is proportionate if it is rationally connected to the objective, constitutes a minimal impairment of the right, and is proportional in its effects. This test has a varying standard of application. When applied to legislation that balances competing interests between citizens or groups, the courts will adopt a more deferential approach to the Legislature than when applied to legislation in which the state acts as the "singular antagonist" of the individual whose rights are infringed.[55]

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[52] *Supra*, note 6, at 850.

[53] *Supra*, note 7, at 994.

[54] [1986] 1 S.C.R. 103, at 138-39, 26 D.L.R. (4th) 200, at 227 (hereinafter referred to as "*Oakes*").

[55] *Irwin Toy Ltd. v. Quebec (Attorney-General)*, [1989] 1 S.C.R. 927, at 993-94, 58 D.L.R. (4th) 577, at 625-26.

Commentators have suggested various objectives for maintaining legislative distinctions between married and unmarried heterosexual couples. These include: promoting marriage as a favoured family form, on the grounds that it best serves public morality and ensures family stability, support obligations, and the care of children;[56] protecting individual autonomy by restricting spousal obligations to those who have chosen to marry;[57] discouraging women's economic dependency;[58] and reducing the incidence of competing claims for spousal rights.[59]

We incline to the view that a court would probably accept all of the first group of objectives, relating to the promotion of marriage, as pressing and substantial, with the exception of "promoting public morality". In our view, the latter argument, that couples who live together without the benefit of marriage are leading an immoral lifestyle that the state should discourage by imposing legal disadvantages on them, is not supportable. It relies on a view of morality rooted in particular religious traditions and, as such, appears to violate directly the Charter's own guarantees of freedom of conscience and religion.[60]

Assuming that the other objectives in this group satisfy the first branch of the *Oakes* test, a court would then consider whether the restrictive definition of spouse used in the *Family Law Act* is proportionate to the objective. In our view, the proportionality of the current restrictive definition of spouse is in question, as it relates to each possible objective. First, the state has a legitimate interest in promoting family forms to the extent that stable relationships foster society's interest by providing support for family members and care for children. The exclusion of unmarried heterosexual

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56 Michael D.A. Freeman and Christine M. Lyon, *Cohabitation without Marriage*[:] *An Essay in Law and Social Policy* (Aldershot, U.K.: Gower, 1983), at 184 and Lenore J. Weitzman, "Legal Regulation of Marriage: Tradition and Change" (1974), 62 Cal. L. Rev. 1169.

57 Christine Davies, "Cohabitation Outside of Marriage: The Path to Reform", in Margaret E. Hughes and E. Diane Pask (eds.), *National Themes in Family Law* (Toronto: Carswell, 1988) 195, at 204-05; Ruth Deech, "The Case Against Legal Recognition of Cohabitation", in John M. Eekelaar and Sanford N. Katz (eds.), *Marriage and Cohabitation in Contemporary Societies*[:] *Areas of Legal, Social and Ethical Change* (Butterworths: Toronto, 1980) 300, at 300-12; Freeman and Lyon, *supra*, note 56, at 89-91; and New South Wales Law Reform Commission, *supra*, note 5, at 112-13.

58 Freeman and Lyon, *supra*, note 56, at 192.

59 *Ibid.*, at 193 and Deech, *supra*, note 57, at 305.

60 Charter, s. 2(a). An analogous case is *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, decided prior to *Oakes*, *supra*, note 54, in which the Court held that the purpose of Sunday-closing legislation was to compel observance of the Christian sabbath. The Court held that this purpose violated the guarantee of freedom of conscience and religion and could not serve as a justification under s. 1.

couples from rights and responsibilities under the *Family Law Act* may not appear rationally connected to this goal, however, since these relationships may serve the same function as marriages. In *Canada (Attorney General) v. Mossop*, L'Heureux-Dubé J. commented that:[61]

> It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family forms.

The view that state support for the traditional family does not require, or justify, differential treatment of other family forms has infused interpretation of the marital-status ground of discrimination under the Ontario *Human Rights Code*. In *Leshner v. Ontario (No.2)*,[62] the majority reasons state:

> [W]e do not believe that we should accept the proposition that support for the traditional family or for the institution of marriage must entail the exclusion and disadvantaging of other family forms. The family is the cornerstone of society, and accordingly this core value should be fostered by governments. Marriage and the "traditional" family are certainly sustaining institutions of society, but they should not be used as a means to impose discrimination and disadvantage on others.

Accordingly, the rational connection of a restrictive legislative definition of spouse to promoting the institution of family appears doubtful.

A second apparently valid objective of differential treatment for spouses is the concern to protect the individual autonomy of those who have not married. The property provisions of the *Family Law Act* impose serious financial obligations. Some unmarried heterosexual couples may have not made a conscious choice to take on mutual economic responsibilities; others will have made a deliberate choice to avoid the economic consequences of marriage now imposed by the law. Professor Christine Davies expressed this view in an issues paper prepared for the Alberta Institute of Law Research and Reform:[63]

> Most cohabitants have chosen not to marry. Many have chosen not to marry for the very reason that they wish to avoid the legal commitment involved in marriage and reject the traditional marriage contract. Are we to impose on such people the very status they have freely chosen to avoid? Others have

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[61] [1993] 1 S.C.R. 554, at 634, 100 D.L.R. (4th) 658, at 712 (per L'Heureux-Dubé J. dissenting). Chief Justice Lamer, writing for the majority, did not comment on this issue.

[62] *Supra*, note 20, at D/203.

[63] Davies, *supra*, note 57, at 204-05.

> chosen not to marry for financial reasons. These people are well aware of the situation in which they have placed themselves. If they have suffered a financially draining divorce and wish to avoid a repetition why should the law force upon them a similar fate? Piecemeal reform to avoid inequity and hardship would appear more apposite here than assimilation of marriage and cohabitation. Finally, it seems quite inappropriate to impose the rights and obligations of marriage on people who lack the interspousal commitment that marriage involves. Those people who have chosen to cohabit for a trial period before marriage should surely not have imposed upon them those very obligations that they deliberately sought to avoid until the experimental period has expired.

This objective appears to satisfy the rational connection element of the proportionality test. The exclusion of unmarried heterosexual couples from the property provisions of the *Family Law Act* respects the individual autonomy of those who have chosen to avoid the legal obligations of marriage. Evidence presented by other commentators, however, suggests that responding to this concern may have disproportionate consequences on individuals in common-law relationships that result in economic interdependence between the parties.

The assumptions underlying the Alberta study about the nature of most common-law relationships are open to question. The conclusions on this point were based on a survey of cohabitants in that province. One of the reasons for cohabitation suggested in this survey was a desire to avoid the "legal commitment" that marriage involves.[64] The phrase "legal commitment" may appear vague. Not all the participants in the survey who listed this as a reason to cohabit may have meant to express a conscious desire to avoid all the property and support rights available to married persons. In any case, this reason was listed by cohabitants as only the fourth most important reason to cohabit, behind the desire for love, companionship, and the fact that "one of us is not legally free to marry". Other commentators have argued that cohabitation without marriage is seldom the result of a conscious, mutual decision not to marry. Rather, studies in the United States and Sweden have shown that most couples gradually drift into a cohabitation relationship.[65] Without better data in the form of current Canadian studies, it is impossible to determine conclusively the reasons why

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[64] Institute of Law Research and Reform, *Survey of Adult Living Arrangements: A Technical Report* (Research Paper No. 15) (Edmonton: November 1984).

[65] Winifred H. Holland, "Cohabitation and Marriage—A Meeting at the Crossroads?" (1991), 7 Can. Fam. L.Q. 31, at 47; Jan Trost, Unmarried Cohabitation (Vasteras, Sweden: International Library/Librairie International, 1979), at 63-64; Grace Ganz Blumberg, "Cohabitation Without Marriage: A Different Perspective" (1981), 28 U.C.L.A. L. Rev. 1125, at 1134-36, 1167-70; and Eleanor D. Macklin, "Nonmarital Heterosexual Cohabitation" (1978), 1 Marriage & Fam. Rev., at 1, 6.

couples cohabit rather than marry. It seems probable, however, that only a minority of couples make a conscious and mutual decision to avoid the legal rights and responsibilities that now attach to marriage. Denying all unmarried heterosexual couples these rights and responsibilities appears to be a disproportionate response. Under current law, those couples who wish to do so may enter binding contractual arrangements concerning such matters as support. This existing right to contract out of the obligations imposed by the *Family Law Act* appears to be a far less intrusive alternative means to protect individual autonomy. The wishes of couples who have made a decision to avoid the "legal commitment" of marriage can be given effect in this fashion without denying to many others the protections afforded by the *Family Law Act*.

A third apparently legitimate objective for the restrictive definition of spouse in the *Family Law Act*, is the goal of discouraging the economic dependence of women. The argument would be that if more women receive the protections of the *Family Law Act*, they will be encouraged to enter economically dependent roles, for example by performing unpaid household or child-care services, in the knowledge that they will receive a fair share of wealth accumulated during the marriage. Unfortunately, however, the application of the *Family Law Act* cannot ensure that a woman who has worked in the home will receive sufficient resources to recover her independence if the relationship fails. Often, following the breakdown of a relationship there is insufficient family property to provide adequately for both spouses. We have grave concerns, however, about the proportionality of the legislation as an expression of the objective of discouraging economic dependence. The measure does not appear to be rationally connected to the objective. It appears rather unrealistic to assume that the *Family Law Act* itself is a significant driving force in individual decision-making that leads to economic dependency. Pressures external to family law, such as the gender gap in earnings and gender-based expectations about the roles that individuals are expected to assume within families, appear to be more important factors in determining whether a woman will become economically dependent on her partner.

A fourth apparently legitimate objective for the current definitions of spouse in the *Family Law Act* is the goal of reducing the likelihood of competing claims. If the definition of spouse is expanded to include common-law spouses, the situation in which more than one spouse seeks a share of family property will occur with greater frequency. This possibility already exists when individuals form a succession of relationships. For example, the law may now result in simultaneous support orders to a husband or wife, and to a common-law spouse. As well, an individual who marries and divorces more than once will be subject to property equalization for each relationship, although only wealth accumulated during the relationship is shared. A

conflict may arise if a spouse has a contingent equalization liability against a prior spouse when entering a new relationship. The value of this contingency may be difficult to determine. The statute now provides that the value of the matrimonial home is always included in the equalization calculation. Conceivably, a wife or husband, and a common-law spouse, could have claims against the same matrimonial home. In the companion *Report on Family Property Law*, we have recommended that special treatment of the matrimonial home in Part I of the Act should cease. If implemented, this reform would avert this difficulty. All the other potential situations in which competing claims may occur arise under the existing legislation. The inclusion of unmarried heterosexual couples in the definition of spouse would merely increase the number of such claims. We believe that there are alternative responses to the problem of competing claims, such as reducing limitation periods or prioritizing the first claim, that would infringe equality rights to a lesser extent.

In light of the analysis above, we believe that there are serious questions about the constitutionality of the current exclusion of unmarried heterosexual spouses from the rights and responsibilities found in Parts I and II of the *Family Law Act*. The exclusion arguably breaches section 15 of the Charter and cannot be justified under section 1. This possibility alone supports the need for reform. As well, positive policy reasons exist for the inclusion of common-law spouses throughout the *Family Law Act*.

(b) Policy Rationale for Reform

We have identified several considerations that favour ending the differential treatment of married and common-law spouses, as follows.

(i) Functional Similarities

Many relationships formed by unmarried heterosexual couples resemble marriages. Common-law spouses pool their resources and make joint economic plans, they provide each other financial and emotional support, and they raise children. Society values the performance of these functions. To the extent that the *Family Law Act* provides an effective legal regime to deal with the economic consequences of marriage, it should apply equally to unmarried heterosexual couples in functionally similar relationships. The relationships of some common-law spouses do not share these characteristics. Nor do the relationships of some married spouses, although they have at least consciously chosen their status. We believe, however, that the *Family Law Act* provides a fundamentally fair regime for dealing with the economic consequences of marriages and similar

relationships, and that it contains sufficient flexibility, by allowing individuals to contract out of its provisions, to protect individual autonomy and diversity. In our view, to the extent that common-law spouses have relationships similar in form to marriage, as envisioned by the *Family Law Act*, they should be subject to the rights and responsibilities imposed by that Act.

(ii) Reasonable Expectations

We are concerned that the partial inclusion of common-law spouses in the *Family Law Act*, coupled with inclusion in many other legislative schemes both federally and provincially, has led to public confusion. Anecdotal evidence suggests that many common-law spouses believe that the Act already grants them a right to equalization of the value of family property. Studies in American and Swedish jurisdictions indicate that common-law spouses do not recognize legal distinctions between cohabitation and marriage.[66] An Ontario family lawyer has observed:[67]

> One of the most popularly held misconceptions among the lay public relates to the rights of a party to a common law relationship upon the breakdown of the union. Inevitably, the family law practitioner is confronted on consultation with a client certain that he or she has either acquired, or is liable for, an equal sharing of property upon termination of the relationship (not formalized by marriage but of some permanence in any event.)
>
> Confusion often exists as to the basis for the right or obligation; however, the conviction often exists nevertheless. Some clients perceive that they have acquired or become liable to share assets as a result of years served ("We've lived together for six years so half is mine, right?")....
>
> Whatever the source, the widely held view exists that relationships of some permanence between two parties of the opposite sex, not formalized by legal marriage, confer property rights upon breakdown of the union.

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[66] Blumberg, *ibid.*, notes at 1167-68:

> Sociologists report that most cohabitants feel there is no difference between marriage and cohabitation....Indeed, surveys of unmarried cohabitants reveal that they grossly underestimate the legal distinction between cohabitation and marriage. They think they will be and ought to be treated as though they were married persons.

[67] Joseph, *supra*, note 34, at 235.

(iii) Compensation for Economic Contribution

As in many marriages, many unmarried heterosexual couples organize their economic contribution along gender lines, with the woman in the relationship making career choices that harm her individual economic interest. While a couple live together, a division of labour that favours the man's career at the expense of the woman's may make economic sense. Such an arrangement may be driven by the gender gap in wages. There may be other personal or economic reasons, why a couple may decide that one of them, typically the woman, should perform unwaged labour in the home. If such a relationship breaks down, the partner who has sacrificed her career in the interest of maximizing the economic success of the other will often suffer a severe loss in future earning capacity.[68] Unmarried spouses do have the option of seeking restitution for their contribution at common law. As discussed above, however, there are substantial hurdles to proving a common-law claim, related to both the evidence required and the cost. Expanding access to the statutory equalization scheme would reduce the risk that the contribution of one common-law spouse to the other will be unrewarded.

(iv) The Interaction of Family Law and Social Assistance

As the *Family Law Act* stands, unmarried heterosexual couples are included within the definition of spouse for the purposes of the statutory obligation for mutual support. The statute provides that, even if spouses have agreed by contract to absolve one another of a support obligation, that contract may be set aside if one subsequently must seek public assistance.[69] Some commentators have argued that the reason that unmarried couples have received legal recognition to this extent, is to protect the state from social-assistance claims.[70]

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[68] The Department of Justice and Status of Women Canada commissioned a report on the economic disadvantages and advantages arising from marriage and its breakdown that analyzes statistical labour-market information indicating the economic impact on women of interrupting or reducing work in the paid labour force. The report also includes some evidence of corresponding economic advantages experienced by married men. These patterns presumably apply to unmarried heterosexual couples who make the same economic decisions: Richard Kerr, *An Economic Model to Assist in the Determination of Spousal Support* (prepared for the Department of Justice and Status of Women Canada) (Spring, 1992).

[69] *Family Law Act*, *supra*, note 1, ss. 33(4)(b).

[70] Don MacDougall, "Policy and Social Factors Affecting the Legal Recognition of Cohabitation without Formal Marriage", in John M. Eckelaar and Sanford N. Katz (eds.), *Marriage and Cohabitation in Contemporary Societies*[:] *Areas of Legal, Social and Ethical Change* (Toronto: Butterworth, (1980)) 313, at 316. See, also, Mary Ann Glendon, *The*

Some have argued that minimizing the burden on the welfare system is not an appropriate objective for the *Family Law Act*.[71] On practical grounds, others have noted that often a former spouse will not have the financial ability to provide support in any case.[72] On the other hand, it does seem unfair to allow a private individual to profit from the efforts of a spouse and then to be absolved of all obligations to compensate that spouse for losses suffered due to the relationship, to the extent that the individual has the resources to do so. The state should not, in such cases, assume a responsibility that properly belongs to the individual. The 1988 Report of the Social Assistance Review Committee[73] concluded that:

> We believe that it is reasonable and appropriate to expect those with private support obligations to meet them to the best of their ability. The fact that the state is prepared to provide support when it is not otherwise available is no justification in itself for relieving a spouse or parent of financial obligations and thereby increasing the likelihood that a recipient's stay in the social assistance system will be a lengthy one.

The Committee's report also identified a number of deficiencies in Ontario's current social assistance regime and recommended a number of changes to remedy them. Even if such reforms are implemented, however, we would not recommend that the private obligation of support should be abandoned. Where one spouse has made an economic contribution to the wealth or welfare of the other or has made, for example, career decisions in reliance on the existence of the spousal relationship, it is not obvious that such a spouse, if in need of support, should be left to obtain whatever level of support is available from public assistance schemes. Private support rights and public assistance schemes—though their objectives may overlap in

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Transformation of Family Law[:] *State, Law,and Family in the United States and Western Europe* (Chicago: The University of Chicago Press, 1989), at 287; Stephen Parker, *Informal Marriage, Cohabitation and the Law, 1750-1989* (New York: St. Martin's Press, 1990), at 147-56; and Freeman and Lyon, *supra*, note 56, at 146.

71 Brenda Cossman and Bruce Ryder, who prepared the research paper on which this report is based, take this view, stating: "[W]e do not believe that the privatization of the costs of family breakdown specifically or social welfare more generally is a legitimate state objective": *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (June 1993), at 64.

72 Mary Jane Mossman, "Family Law and Social Welfare in Canada", in Ivan Bernier and Andrée Lajoie (eds.), *Family Law and Social Welfare Legislation in Canada* (Toronto: University of Toronto Press, 1986) 43, at 51, and Margrit Eichler, "The Limits of Family Law Reform or, the Privatization of Female and Child Poverty" (1991), 7 Can. Fam. L.Q. 59, at 80. Note that Kerr, *supra*, note 68, while agreeing with Eichler's general point, has observed that she bases her conclusion on the average earnings of all men, failing to take into account the fact that the earnings of men with dependent spouses are significantly greater than the average.

73 Ontario, Social Assistance Review Committee, *Transitions* (report prepared for the Ministry of Community and Social Services), (Toronto: Queen's Printer, 1988), at 486.

particular cases—have different structures and rationales. Whether or not the Social Assistance Review Committee reforms were implemented, it is likely that social welfare payments will always provide little better than minimal support.

Further, though it is true that any uncompensated economic contribution between an unmarried couple is potentially recoverable at common law, problems with the application of these remedies, and access to them, may hinder or prevent recovery. In some cases, therefore, an individual with a private right against a former common-law spouse may have to resort to public assistance. This seems unfair. Further, if one of the rationales of including common-law couples within the definition of spouse under Part III is to reduce demands on public assistance, there appears little sense in maintaining a restrictive definition for the Act's property sharing provisions.

3. CONCLUSION

We believe that the current statutory provisions for common-law spouses in the *Family Law Act* require reform. As noted above, the constitutionality of restricting the definition of spouse to married persons in Parts I and II of the Act is in serious question. As well, there are positive policy reasons for expanding the scope of the legislated definition to ensure that unmarried heterosexual couples are subject to all the rights and responsibilities of the *Family Law Act*.

Accordingly, the Commission recommends that the definition of "spouse" contained in section 1(1) of the *Family Law Act* should be amended to include unmarried heterosexual spouses.[74] This would ensure that such spouses have the same rights and responsibilities as married spouses, throughout the Act.

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[74] Later in this report, the Commission makes a recommendation with respect to the definition of "spouse". See *infra*, ch. 4, sec. 1.

CHAPTER 3

SAME-SEX COUPLES

1. THE CURRENT LAW

(a) THE *FAMILY LAW ACT*

Gay and lesbian couples are completely excluded from the rights and responsibilities imposed by the *Family Law Act*[1]. This exclusion is part of a historical pattern. Our society has never recognized same-sex relationships. Until 1969, gay sexual relationships were treated as criminal,[2] and courts have denied gay and lesbian relationships the status of marriage.[3] No Canadian jurisdiction has included same-sex cohabitants in family legislation. In recent years, however, some foreign jurisdictions have done so.[4]

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[1] R.S.O. 1990, c. F.3.

[2] In 1969, the *Criminal Code*, S.C. 1953-54, c. 51, was amended to decriminalize consensual anal intercourse, when engaged in by husband and wife or by two persons over the age of twenty-one: s. 149a, as en. by *Criminal Law Amendment Act, 1968-69*; S.C. 1968-69, c. 38, s. 7. For discussion, see Gary Kinsman, *The Regulation of Desire[:] Sexuality in Canada* (Montreal: Black Rose Books, 1987).

[3] *Hyde v. Hyde* (1866), L.R. 1, P. & D. 130, at 133, [1861-73] All E.R. Rep. 175, at 177; Re *North and Matheson* (1974), 52 D.L.R. (3d) 280, 20 R.F.L. 112 (Man. Co. Ct.); and, recently, in *Layland v. Ontario* (*Minister of Consumer and Commercial Relations*) unreported (March 17, 1993, Div. Ct.), currently under appeal to the Ontario Court of Appeal, File No. C15711.

[4] In Sweden, the *Homosexual Cohabitees Act* (S.F.S. 1987: 813, as am. by S.F.S. 1987: 1207) confers the same rights on lesbian and gay partners as on unmarried heterosexual couples. In Denmark, gay and lesbian couples may register partnerships. The legal effect of a registered partnership is the same as marriage: Act No. 372 of June 7, 1989. For discussion, see Linda Nielsen, "Family Rights and the 'Registered Partnership' in Denmark" (1990), 4 Int'l J.L. & Fam. 297, at 298; Ingrid Lund-Andersen, "Moving towards an Individual Principle in Danish Law" (1990), 4 Int'l J.L. & Fam. 328; and M. Hojgaard Pedersen, "Denmark: Homosexual Marriages and the New Rules regarding Separation and Divorce" (1991-92), 30 J. Fam. L. 289. The Queensland Law Reform Commission has proposed that same-sex and unmarried heterosexual couples should become subject to property and support obligations: *De Facto Relationships* (Working Paper 40) (1992). The state government has not acted on this recommendation as yet. In the United States, municipalities have taken the lead in recognizing registered partnerships between same-sex couples. These include: Berkeley, West Hollywood, Los Angeles, San Francisco, Santa Cruz, and Laguna Beach in California; Takoma Park, Maryland; Ann Arbor, Michigan; Minneapolis, Minnesota; Ithaca and New York, New York; Seattle, Washington; Madison, Wisconsin; West Palm Beach, Florida; and the

(b) The Common Law

Same-sex spouses have access to the same common-law remedies as unmarried heterosexual spouses, under the law of restitution.[5] As discussed in chapter 2, the common law permits claimants to seek compensation for uncompensated contributions made, directly or indirectly, to the acquisition, maintenance, or preservation of an asset held by another person. The remedy may be either in the form of monetary compensation or a beneficial interest in the contested asset.[6] Presumably, a same-sex spouse could also claim a contractual licence to possession of the couple's shared home, given the precedent of English case law.[7] There are no reported cases of such claims in Canada, however.

Same-sex couples may have a common-law right to enter cohabitation contracts. Traditionally, courts have refused to enforce cohabitation agreements between unmarried heterosexual couples on public policy grounds.[8] Common-law heterosexual couples now have the right to enter cohabitation agreements by statute.[9] Today, Canadian courts are more receptive to the idea of recognizing cohabitation contracts at common law.[10] There are no reported cases in which a Canadian court has considered the enforceability of a cohabitation agreement between same-sex spouses,[11] however, although community advocates have recommended that same-sex couples negotiate such agreements.[12]

District of Columbia. For a discussion of these municipal ordinances, see Craig A. Bowman & Blake M. Cornish, "A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances" (1992), 92 Colum. L. Rev. 1164; Rebecca L. Melton, "Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of 'Family'" (1990-91), 29 J. Fam. L. 497; Timothy B. Walker & Linda D. Elrod, "Family Law in the Fifty States" (1992-93), 26 Fam. L.Q. 319, at 329; and Roberta Achtenberg & Barbara Gilchrist (eds.), *Sexual Orientation and the Law* (Deerfield, Ill.: Clark Boardman Callaghan, looseleaf).

5 For example, see *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).

6 For a more detailed discussion of the common law remedies and their application to domestic property disputes, see ch. 2 of the companion Ontario Law Reform Commission, *Report on Family Property Law* (1993).

7 See *Tanner v. Tanner*, [1975] 3 All E.R. 776 (C.A.); *Chandler v. Kerley*, [1978] 2 All E.R. 942 (C.A.); and *Horrocks v. Forray*, [1976] 1 All E.R. 737 (C.A.).

8 See *Fender v. St. John Mildmay*, [1938] A.C. 1, [1937] 3 All E.R. 402 (H.L.).

9 *Family Law Act*, *supra*, note 1, Part IV.

10 *Chrispen v. Topham* (1986), 48 Sask.1 R. 106, 3 R.F.L. (3d) 149 (Q.B.), aff'd (1987), 59 Sask. R. 145, 9 R.F.L. (3d) 131 (C.A.).

11 In *Anderson v. Luoma*, *supra*, note 5, the court considered whether a contract existed between the parties. The court did not question the enforceability of such an agreement.

12 For example, see Laurie Bell, *On Our Own Terms* (Toronto Coalition for Lesbian and Gay Rights in Ontario, 1991).

2. THE NEED FOR REFORM

(a) The Parameters of Anti-Discrimination Law

Does the exclusion of same-sex couples from the mutual rights and responsibilities imposed by the *Family Law Act* constitute unlawful discrimination? As in chapter 2, we will consider this question in the light of both the Ontario *Human Rights Code*[13] and section 15 of the *Canadian Charter of Rights and Freedoms.*[14]

(i) Human Rights Jurisprudence

There are two grounds of discrimination listed in the Ontario *Human Rights Code* that are relevant to the treatment of same-sex couples: "marital status" and "sexual orientation".

On the face of the statute, an individual who cohabits in an intimate relationship with a person of the same sex cannot claim "marital status" discrimination, because the term is defined restrictively to include "the status of being married, single, widowed, divorced or separated and ... the status of living with a person of the opposite sex in a conjugal relationship outside marriage".[15] In the last year, two Ontario boards of inquiry have held that this definition breaches section 15 of the Charter. In *Leshner v. Ontario (No. 2)*,[16] the majority of the Board observed that:

> By the *Code*'s definition, Mr. Leshner is considered to have the 'marital status' of a 'single' person. He is not 'married...widowed, divorced or separated' and he is not "living with a person of the opposite sex in a conjugal relationship outside marriage". For the *Code*'s purposes, Mr. Leshner has the marital status of being 'single'. The *Code* itself, in its definition of 'marital status' discriminates against gays and lesbians, thereby denying recognition of the

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13 R.S.O. 1990, c. H.19 (hereinafter referred to as the "Code").

14 Hereinafter referred to as the "Charter".

15 Code, *supra*, note 13, s. 10(1). Saskatchewan is the only other province to define "marital status" in its human rights statute. Section 1(a) of the Saskatchewan Regulations under the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 (Sask. Reg. 216/79) provides:

> "Marital status" means that state of being engaged to be married, married, single, separated, divorced, widowed or living in a common-law relationship, but discrimination on the basis of a relationship with a particular person is not discrimination on the basis of marital status.

16 (1992), 16 C.H.R.R. D/184, at D/198 (Ont. Bd. of Inquiry) (hereinafter referred to as "*Leshner*").

> 'status' of 'living with a person of the same sex in a conjugal relationship outside marriage' as an identifiable and separate status, from that of being 'single'.

The Board ordered that the Code's definition of marital status be read down to omit the words "of the opposite sex".[17] The Ontario government chose not to appeal the Board's decision. In *Clinton v. Ontario Blue Cross*,[18] a board of inquiry affirmed the *Leshner* approach. The respondent in that case will appeal the decision. Assuming that the courts uphold the decisions in *Leshner* and *Clinton*, the Code will prohibit discrimination against Ontarians in gay and lesbian relationships on the ground of "marital status". The definition may also be expanded by statute, under a private member's Bill that received first reading June 8, 1993.[19] If passed, the Bill will amend the definition of "marital status" to remove the limiting words "of the opposite sex".

A second relevant ground of discrimination is "sexual orientation". The Code prohibits discrimination on this basis in the provision of services, goods, and facilities, accommodation, employment, vocational associations, and contracts.[20] Sexual orientation is also a listed ground of discrimination in the human rights legislation of seven other Canadian jurisdictions.[21]

As noted above, in our view the Code does not apply to the provisions of the *Family Law Act*. If the Code were to apply to the *Family Law Act*, however, the exclusion of same-sex couples from the definition of spouse

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17 *Ibid.*, at D/223.

18 Unreported (July 14, 1993, Ont. Bd. of Inquiry) (hereinafter referred to as "*Clinton*").

19 *Human Rights Code Amendment Act (Sexual Orientation)*, Bill 45, 1993 (35 Leg. 3d Sess.), s. 3 (second reading, June 24, 1993).

20 See the Code, *supra*, note 13, ss. 1-6, Bill 45, *supra*, note 19, ss. 1 and 2, would also amend the Code, ss. 2(2) and 5(2) respectively, to provide that sexual orientation is included as a listed ground of discrimination in the context of harassment in accommodation or employment.

21 See *Human Rights Act*, S.B.C. 1984, c. 22, as am. by S.B.C. 1992, c. 42; *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C—12, s. 10, as am. by S.Q. 1982, c. 61, s. 3; *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 5(1)(n), as am. by S.N.S. 1991, c. 12, s. 1; *An Act to Amend the Human Rights Act*, S.N.B. 1992, c. 30; *Human Rights Code*, S.M. 1987-88, c. 45, s. 9(2); and, *Human Rights Act*, R.S.Y. 1986, c. 11, (Supp.), as am. by S.Y. 1987, c. 3, s. 6. The *Canadian Human Rights Code*, R.S.C. 1985, c. H-6, does not currently include sexual orientation as a prohibited ground of discrimination, but the Ontario Court of Appeal has held that the failure to include this ground breaches the Charter: *Haig v. Canada* (1992), 9 O.R. (3d) 495, 94 D.L.R. (4th) 1 (C.A.) (hereinafter referred to as "*Haig*") (subsequent references are to 9 O.R. (3d)). The Minister of Justice decided not to appeal this decision. The federal government introduced *An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof*, Bill C-108, 1992 (34th Parl. 3d Sess.), in December 1992, to add sexual orientation as a prohibited ground of discrimination to the *Canadian Human Rights Act*, but the Bill died on the order paper.

could, arguably, constitute discrimination on the ground of "marital status" or "sexual orientation". In considering legislation and practices that treat same-sex cohabitants differently from heterosexual cohabitants or married spouses, human rights adjudicators have had difficulty in determining whether the discrimination is on the basis of marital or family status or sexual orientation. Differential treatment could be discrimination on either or both grounds. The point might appear to be of only academic interest, but in some cases courts have denied recovery on the basis that the claimant proceeded under the wrong ground.[22]

Most of the substantive discussion of discrimination against same-sex cohabitants has occurred in the context of the Charter guarantee of equality, to which we now turn.

(ii) Equality Rights Jurisprudence

Sexual orientation is not a listed ground of discrimination under section 15 of the Charter. Most courts[23] and commentators[24] have concluded, however, that sexual orientation is an analogous ground of discrimination. On several occasions, governments have conceded that gay men and lesbians form a group that has historically experienced

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[22] For example, see *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 (hereinafter referred to as "*Mossop*") (subsequent references are to [1993] 1 S.C.R.), and *Egan v. Canada* (1993), 103 D.L.R. (4th) 336, 153 N.R. 161 (F.C.A.), leave to appeal to S.C.C. granted, October 15, 1993 (hereinafter referred to as "*Egan* (F.C.A.)") (subsequent references are to 103 D.L.R. (4th)).

[23] *Brown v. British Columbia (Minister of Health)* (1990), 42 B.C.L.R. (2d) 294, 66 D.L.R. (4th) 444 (S.C.) (hereinafter referred to as "*Brown*"); *Douglas v. Canada*, [1993] 1 F.C. 264, 98 D.L.R. (4th) 129 (T.D.) (hereinafter referred to as "*Douglas*"); *Egan* (F.C.A.), *ibid.*; *Haig*, *supra*, note 21; *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356, [1991] 6 W.W.R. 728 (S.C.), additional reasons at (1992), 6 C.P.C. (3d) 340 (S.C.) (hereinafter referred to as "*Knodel*"); *Layland v. Ontario (Minister of Consumer and Commercial Relations)*, *supra*, note 3; *Leshner*, *supra*, note 16; *Veysey v. Canada (Commissioner of the Correctional Service)* (1989), [1990] 1 F.C. 321, 29 F.T.R. 74 (T.D.), aff'd on other grounds (1990), 34 F.T.R. 240n, 109 N.R. 300 (C.A.) (hereinafter referred to as "*Veysey*"); *contra*: *Andrews v. Ontario (Minister of Health)* (1988), 64 O.R. (2d) 258, 49 D.L.R. (4th) 584 (H.C.J.) (subsequent references are to 64 O.R. (2d)).

[24] Arnold Bruner, "Sexual Orientation and Equality Rights" in Anne F. Bayefsky and Mary Eberts (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 457; James E. Jefferson, "Gay Rights and the *Charter*" (1985), 43 U.T. Fac. L. Rev. 70; Margaret Leopold and Wendy King, "Compulsory Heterosexuality, Lesbians and the Law: The Case for Constitutional Protection" (1985), 1 Can. J. Women & L. 163; Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990), 9 Can. J. Fam. L. 39; Margaret Schneider and Brian O'Neill, "Eligibility of Lesbians and Gay Men for Spousal Benefits: A Social Policy Perspective" (1993), 2 Can. J. Hum. Sexuality 23.

discrimination, and continues to do so.[25] The Parliamentary Committee on Equality Rights[26] concluded that sexual orientation is analogous to the listed grounds in section 15. The federal government agreed with this opinion.[27] The Ontario government also indicated its tacit acceptance that the Charter prohibits discrimination on the basis of sexual orientation by adding this as a ground under the *Human Rights Code* as part of an omnibus Bill of amendments designed to bring provincial legislation in line with the Charter.[28]

While a general consensus exists that sexual orientation is a constitutionally prohibited form of discrimination, courts have differed on whether differential treatment of same-sex couples falls into this category. An advocacy group, the Coalition for Gay and Lesbian Rights in Ontario,[29] argues that differential treatment of same-sex relationships is, in essence, discrimination on the basis of sexual orientation:[30]

> Implicit in a recognition that laws should not discriminate against lesbians and gay men is the realization that the defining characteristic of gay men and lesbians is an emotional and physical attraction to members of their own sex. The logical corollary of this is that the law must recognize that gay and lesbian relationships and households are an integral, fundamental part of being gay or lesbian. Individual protection only begins to integrate gay men and lesbians into the legal structure of Ontario society. A recognition of lesbian and gay relationships must follow. Specific legislation must now be enacted to provide full equality to lesbians and gay men and their relationships.

Some courts have agreed with this view, holding that the denial of spousal or family status to gay and lesbian couples constitutes discrimination on the basis of sexual orientation. In these decisions, courts reason that same-sex and heterosexual relationships are functionally similar, therefore, any differential treatment must reflect discrimination on the basis of sexual

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25 See *Leshner*, *supra*, note 16; *Brown*, *supra*, note 23; *Knodel*, *supra*, note 23; *Egan*, *supra*, note 22; *Douglas*, *supra*, note 23; and *Haig*, *supra*, note 21. In *Haig*, at 501, Krever J.A. commented: "I agree [with this concession] and add that, as a matter of law, the concession is right".

26 Canada, House of Commons, *Equality for All*, (Report) (Chair: J. Patrick Boyer) (Ottawa: Supply & Services Canada, October 1985), at 29.

27 Canada, *Toward Equality[:] The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: Supply & Services Canada, 1986), at 13.

28 *Equality Rights Statute Law Amendment Act, 1986*, S.O. 1986, c. 64.

29 "*Happy Families[:] The Recognition of Same-Sex Spousal Relationships*" (brief on the recognition of same-sex spousal relationships written for the Ontario Legislature) (Toronto, April 1992) (hereinafter referred to as "*Happy Families*").

30 *Ibid.*, at 9-10.

orientation.[31] The Supreme Court of Canada considered a related problem, family-status discrimination, under the *Canadian Human Rights Code*[32] in *Mossop*[33]. The claimant challenged a denial of bereavement leave under the collective agreement in his workplace for time to attend the funeral of his male partner's father. Chief Justice Lamer held that this did not constitute family-status discrimination within the meaning of the term under the *Canadian Human Rights Code*. He argued that differential treatment of same-sex couples is, rather, a form of sexual-orientation discrimination, quoting with approval the words of Marceau J.A. at the Federal Court of Appeal:[34]

> It is sexual orientation which has led the complainant to enter with [his male partner] into a "familial relationship" (to use the expression of the expert sociologist) and sexual orientation, therefore, which has precluded the recognition of his family status with regard to his lover and that man's father. So in final analysis, sexual orientation is really the ground of discrimination involved.

The majority of the Court denied Mossop's claim, however, because, at the time of the complaint, the *Canadian Human Rights Code* did not prohibit discrimination on this ground, and the constitutionality of this omission was not challenged. Writing in dissent, L'Heureux-Dubé J. agreed with the Chief Justice that denial of family benefits to a same-sex couple constitutes discrimination on the basis of sexual orientation. She argued that this treatment also constituted family-status discrimination under the *Canadian Human Rights Code*.[35]

On the other hand, a number of courts have rejected claims that differential treatment of same-sex spouses constitutes sexual-orientation discrimination. In *Andrews v. Ontario (Minister of Health)*,[36] the Ontario High Court rejected Andrews' challenge to a health regulation that excluded her female partner and their children from the definition of family members. McRae J. held that the regulation did not discriminate because same-sex couples are not "similarly situated" to heterosexual couples. The court reasoned that:[37]

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31 See *Veysey*, *supra*, note 23; *Knodel*, *supra*, note 23; and *Leshner*, *supra*, note 16.

32 *Supra*, note 21.

33 *Supra*, note 22.

34 *Ibid.*, at 581, quoting [1991] 1 F.C. 18, at 37, 71 D.L.R. (4th) 661, at 676 (C.A.).

35 *Ibid.*, at 645.

36 *Supra*, note 23.

37 *Ibid.*, at 263.

> Heterosexual couples procreate and raise children. They marry or are potential marriage partners and most importantly they have legal obligations of support for their children whether born in wedlock or out and for their spouses pursuant to the *Family Law Act*, 1986, S.O. 1986, c. 4, ss. 30, 31, 32, 33. A same-sex partner does not and cannot have these obligations.

This argument has certain weaknesses. Some same-sex couples do raise children together. In fact, Andrews sought acknowledgement that the children she cared for with her partner were family members. As well, under the *Family Law Act,* an individual cohabiting with a same-sex partner who has children may be considered a parent for the purpose of support.[38] In addition, the view that same-sex couples cannot incur support obligations under the *Family Law Act* is a legal conclusion, not an argument for excluding such individuals from the definition of spouse. In any event, the argument rests on an application of the "similarly situated" test for equality that the Supreme Court of Canada later rejected in *Andrews v. Law Society of British Columbia*.[39]

McRae J. found, in the alternative, that if the exclusion of same-sex couples from spousal status violates section 15 of the Charter, such a breach is justifiable under section 1 because the legislation does not exclude same-sex couples alone, but also excludes many other household forms, such as those consisting of adult siblings or unrelated friends.[40] McRae J.'s alternative argument has received more attention in subsequent cases.

Martin J. employed a similar argument to reject a challenge to the denial of a spouse's allowance under the *Old Age Security Act*[41] in *Egan v. Canada*.[42] He held that the restriction of this benefit to heterosexual

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[38] *Family Law Act*, *supra*, note 1, s. 1(1) defines "parent" as:

> "parent" includes a person who has demonstrated a settled intention to treat a child as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

Section 31 imposes a support obligation:

> 31.—(1) Every parent has an obligation to provide support, in accordance with need, for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so.

[39] [1989] 1 S.C.R. 143, at 167, 56 D.L.R. (4th) 1, at 12 (subsequent references are to [1989] 1 S.C.R.).

[40] *Andrews v. Ontario*, *supra*, note 23, at 265.

[41] R.S.C. 1985, c. O-9.

[42] (1991), [1992] 1 F.C. 687, 87 D.L.R. (4th) 320 (T.D.) (subsequent references are to [1992] 1 F.C.) (hereinafter referred to as "*Egan* (F.C.T.D.)").

couples does not constitute sexual orientation discrimination for the following reason:[43]

> Parliament has chosen to address the needs of persons of the opposite sex who live together in a conjugal state, either statutory or common law, as husband and wife. This unity has traditionally been treated as the basic unit of society upon which society depends for its continued existence. I can see nothing discriminatory against the plaintiffs in a law which provides certain benefits to this group and which law does not provide the same benefits to a homosexual couple in the position of the plaintiffs. The plaintiffs as an homosexual couple, just as a bachelor and a spinster who live together or other types of couple who live together, do not fall within the traditional meaning of the conjugal unit or spouses. When compared to the unit or group which benefits by the challenged law the plaintiffs fall into the general group of non-spouses and do not benefit because of their non-spousal status rather than because of their sexual orientation.

The Federal Court of Appeal affirmed this decision.[44] In his reasons, Robertson J.A. observed that much of the evidence presented in the case by the claimant concerned functional similarities between the relationship of Mr. Egan and his male partner and opposite-sex relationships. In his view, this evidence is relevant only to the "similarly situated test" of equality, rejected by the Supreme Court of Canada in *Andrews v. Law Society of British Columbia*.[45] He held that, under the proper test for equality, the exclusion of same-sex couples from spousal status does not constitute sexual-orientation discrimination, because it imposes a disadvantage shared by all cohabitants who are not heterosexual spouses:[46]

> In the instant case, one cannot ignore the fact that the definition of 'spouse' found in the Act excludes a broad class of non-spouses. Also excluded are persons cohabiting with another in a non-conjugal relationship. Within this group can be found siblings, friends and relatives. Their relationships are similar to others within the excluded category, both in terms of diversity and interdependency.
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> ....
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> Against this backdrop can it be said that the legislative scheme has a disproportionate or more burdensome effect on same-sex couples? I think not.

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[43] *Ibid.*, at 704. In *Vogel v. Manitoba* (1992), 90 D.L.R. (4th) 84, [1992] 3 W.W.R. 131 (Man. Q.B.), the court adopted the reasoning of the Federal Court Trial Division in *Egan* (F.C.T.D.), *ibid.*

[44] *Supra*, note 22.

[45] *Supra*, note 39, cited in *Egan* (F.C.A.), *supra*, note 22, at 390.

[46] *Egan* (F.C.A.), *ibid.*, at 395, 400.

> Before us is a case in which a benefit has been conferred on a narrow class of persons who can be readily identified and who are in financial need because of a pattern of financial interdependency, characteristic of heterosexual couples, and which cannot in any reasonable way be deemed relevant to same-sex couples or, for that matter, other non-spousal relationships. Moreover, while it might have been argued that the impugned legislation has a more burdensome impact on same-sex couples because it denies a benefit to an economically disadvantaged group per se, the appellants led no evidence on this point. In any event, I suspect that such a characterization would be found inapt. It is widely recognized that gay men and lesbians 'are found in all geographical areas, social classes, educational levels, races and religions'.

Mahoney J.A.[47] issued concurring reasons to Robertson J.A.'s judgment.

Linden J.A. dissented from the majority.[48] In his view, the exclusion of same-sex couples from spousal status under the *Old Age Security Act* does constitute discrimination on the grounds of sexual orientation:[49]

> [T]he impugned distinction is drawn on the basis of whether partners in a relationship are of the same sex or "of the opposite sex". Strictly speaking, it is true that this is not a distinction based directly on sexual orientation, since being in a same-sex relationship is not necessarily the defining characteristic of being gay or lesbian. Obviously, many lesbians and gay men may not be involved in relationships. Nevertheless, the distinction in this case is based on a characteristic or matter related to sexual orientation, since it is lesbians and gay men who may enter into same-sex relationships. The words "of the opposite sex" used in the definition of 'spouse' are specifically aimed at excluding lesbian and gay partners from eligibility for spouse's allowance benefits...

In other words, discrimination based on a ground of discrimination prohibited by section 15 as a listed or analogous ground may arise even if the legislative distinction is not designed with reference to the ground. As an example, in *Brooks v. Canada Safeway Inc.*,[50] the Supreme Court of Canada held that a distinction based on pregnancy constitutes sex discrimination. Similarly, in *Janzen v. Platy Enterprises Ltd.*,[51] the Supreme Court of Canada held that sexual harassment is a form of sex discrimination even though the harasser may not treat all members of the sex uniformly.

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47 *Ibid.*, at 339.

48 *Ibid.*, at 343.

49 *Ibid.*, at 358.

50 [1989] 1 S.C.R 1219, 59 D.L.R. (4th) 321.

51 [1989] 1 S.C.R. 1252, 59 D.L.R. (4th) 352.

While Linden J.A. agreed with the majority that the similarly situated test for equality is not relevant to *Charter* analysis, he argued that it is not impermissible to compare the treatment of two groups, as long as that comparative analysis reflects the broad social and political context.[52] Using this analysis, Linden J.A. held that the exclusion of same-sex couples from the definition of spouse stereotypes gay and lesbian relationships ignores the fact that such relationships may be characterized by "long-term affection and mutual support".[53] He argued that the possibility that the existence of a spousal allowance also discriminates against individuals or those cohabiting with friends, siblings, or other relatives, is irrelevant to the determination of whether the definition is discriminatory on the grounds of sexual orientation.[54] As well, he noted that a legislative distinction on the basis of sexual orientation is in breach of section 15 of the Charter, while distinctions on the basis of other forms of relationship may not be.[55]

Having found that the exclusion of same-sex couples from the definition of spouse violates section 15, Linden J.A. considered the federal government's arguments that the discrimination is justifiable under section 1 of the Charter in the light of the *Oakes* test.[56] The parties did not dispute that the government's objective—the creation of a spousal allowance program—satisfies the first branch of the *Oakes* test. Nor did the parties contest that the legislation imposes a program rationally connected to this end. Linden J.A. considered, therefore, only whether the statutory definition is a minimal impairment of the right, and proportional in its effects. Linden J.A. applied the "modified" test employed by the majority of the Supreme Court of Canada in *McKinney v. University of Guelph:*[57] could Parliament "reasonably have chosen an alternative means which would have achieved the identified objective as effectively"?[58] Linden J.A. concluded that Parliament could have chosen the reasonable alternative of including same-

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52 *Egan* (F.C.A.), *supra*, note 22, at 361. Linden J.A. cites *Andrews v. Law Society of British Columbia*, *supra*, note 39; *R. v. Hess*, [1990] 2 S.C.R. 906; *R. v. Swain*, [1991] 1 S.C.R. 933, 125 N.R. 1; and *Rudolf Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695, 69 D.L.R. (4th) 392 (to support this interpretation).

53 *Ibid.*, at 364.

54 *Ibid.*, at 358.

55 *Ibid.*, at 359.

56 *Ibid.*, at 368, citing *R. v. Oakes*, [1986] 1 S.C.R. 103, at 138-39, 26 D.L.R. (4th) 200, at 227 (subsequent references are to [1986] 1 S.C.R.) (hereinafter referred to as "*Oakes*").

57 [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545, *per* La Forest J.

58 *Egan* (F.C.A.), *supra*, note 22, at 369, citing *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at 1341, 69 Man. R. (2d) 161, at 199.

sex couples in the program, noting that budgetary considerations will not justify a violation of section 1.[59]

The Supreme Court of Canada has granted Egan leave to appeal the decision of the majority of the Federal Court of Appeal denying the challenge. It is clear from this review of the case law that sexual orientation discrimination jurisprudence is at an early stage of development. The definition of spouse determines eligibility for many benefits and obligations imposed by legislation at both the provincial and federal levels of government, and restrictive definitions of spouse that exclude same-sex couples have been the target of constitutional challenges. The Supreme Court of Canada has not yet resolved this issue, however, and the constitutional validity of restrictive definitions of spouse will depend upon the context of different legislative schemes. The *obiter* comments of Chief Justice Lamer and Madam Justice L'Heureux-Dubé in *Mossop*,[60] appear to indicate that the court will be receptive to the argument that excluding same-sex couples from legislative definitions of spouse, to their disadvantage, is a form of sexual-orientation discrimination.

The relevant question for our purposes is: does the exclusion of same-sex couples from the definitions of spouse in the *Family Law Act* constitute sexual orientation discrimination? We have found only one reported case in which a party challenged the constitutionality of the exclusion of same-sex couples from a family law statute, *Anderson v. Luoma*.[61] That decision is not of assistance, as the court dismissed the challenge to British Columbia's legislation on the basis that the exclusion is justifiable under section 1, but did not provide any analysis of the issue.[62] In Ontario, there are no decided cases in which the *Family Law Act* definition of spouse have been challenged for the exclusion of same-sex relationships. However, the Act does appear to be vulnerable to constitutional challenge.[63]

A challenge to the definitions of spouse used in the Act would rest on a consideration of whether the provision is discriminatory in the context of the objective of the statute. The purpose of the *Family Law Act* is to provide for the equitable resolution of economic disputes that arise when intimate

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59 *Egan* (F.C.A.), *supra*, note 22, at 369-70, citing *Schachter v. Canada*, [1992] 2 S.C.R. 679, at 709, 93 D.L.R. (4th) 1, at 21.

60 *Supra*, note 22.

61 *Supra*, note 5.

62 *Ibid.*, at 142.

63 The press have reported that a Toronto woman has launched such a challenge as a counterclaim to an unjust enrichment action: Peter Small, "Attorney General intervenes in lesbian 'divorce' case", *The Toronto Star* (April 29, 1993) A1 (morning edition).

relationships between individuals who have been financially interdependent break down (Parts I-IV). As well, it ensures that family members have a means to seek redress when an immediate relative is injured or killed through the negligence of a third party (Part V). This exclusion occurs within a context in which lesbians and gay men have experienced historical and continuing social disadvantage. Social and religious prejudice against gay men and lesbians have hindered the formation and public acknowledgement of such relationships. The relationships of same-sex couples take many forms, as do those of heterosexual couples, but some same-sex couples who live together intermingle their personal and economic lives in the same way as heterosexual couples, who are included within the definition of spouse. We believe that the argument that the exclusion of same-sex couples does constitute discrimination contrary to section 15 of the Charter has considerable force.

Is this discrimination justifiable under section 1? Once again, to be saved under section 1, legislation must have an objective sufficiently pressing and substantial to justify overriding a constitutional right, and its provisions must be proportionate to the objective.[64] Various possible objectives for maintaining legislative distinctions between heterosexual and same-sex couples have been advanced. These include: promoting heterosexual relationships as the preferred family form to ensure for the procreation and raising of children; protecting women from systemic discrimination in heterosexual relationships; and, avoiding the assimilation of same-sex relationships to a heterosexual model. The first two possibilities have received some consideration in related case law. The last has been raised by academic commentators and community advocates.

In our view, the first objective lacks a logical basis. The assumption that there must be a link between a couple's sexual relationship and procreation has been characterized as irrational.[65] In the first place, there is no necessary link between procreation and the raising of children. Many heterosexual couples adopt children and raise them. Many lesbians and gay men who form same-sex relationships also raise children. Further, the capacity to procreate is not an element essential to the recognition of spousal status for heterosexual couples.[66] The identification of procreation as an

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64 *Oakes*, *supra*, note 56, at 138-39.

65 Ryder, *supra*, note 24, at 83-89.

66 In *Layland v. Ontario (Minister of Consumer and Commercial Relations)*, *supra*, note 3, at 11, Southey J., writing for the majority, justified excluding same-sex couples from the institution of marriage and spousal status because of the "biological limitations" of same-sex relationships, despite this fact:

essential element of spousal status perhaps may owe more to the fact that this is an easily identifiable way in which same-sex relationships differ from heterosexual relationships, than to its relevance to the purposes of the *Family Law Act*.

A second possible rationale for restricting the definition of spouse to couples of the opposite sex is the argument that the rights granted to spouses in the *Family Law Act* respond to the particular needs of women. Traditionally, heterosexual relationships adhere to a pattern in which there is a sexual division of labour. Men have primary responsibility for earning an income and women have primary responsibility for unwaged labour in the home. Even in relationships in which women work outside of the home, a greater responsibility for child care and household services may force them to limit their involvement in the workforce or may hinder their career development. As well, because of systemic discrimination against women in the workforce, they may earn less than their male spouses. The fact that a woman earns a lower wage creates an economic incentive for the couple to further the male spouse's career. These economic and social pressures frequently result in women suffering disproportionately from the breakdown of a heterosexual relationship.[67] The *Family Law Act* is a remedial statute that was, arguably, designed to ensure that women received a fair share of family assets.

The relationships of same-sex couples may not correspond to the traditional heterosexual model. In addition, if both partners are of the same sex, any wage differential between the two cannot be ascribed to systemic discrimination in the workplace. Of course, the relationships of some same-sex couples may mimic the heterosexual pattern, with one partner performing unwaged labour in the home or restricting her involvement in the paid workforce,[68] but we do not have sufficient information to know how many same-sex relationships adopt this pattern. We can be certain, however, that systemic discrimination against women in the workplace will not influence the economic relationship of same-sex couples in the same way as it does heterosexual couples. This difference might appear to justify restricting the

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> It is true that some married couples are unable or unwilling to have children, and that the incapacity or willingness [sic] to procreate is not a bar to marriage or a ground for divorce. Despite these circumstances in which a marriage will be childless, the institution of marriage is intended by the state, by religions and by society to encourage the procreation of children.

[67] Richard Kerr, *An Economic Model to Assist in the Determination of Spousal Support* (prepared for the Department of Justice and Status of Women Canada) (Spring 1992).

[68] For example, this appears to have been the case in the relationship documented in *Anderson v. Luoma*, *supra*, note 5.

Family Law Act protections to heterosexual couples.[69] Yet the *Family Law Act* is not drafted to respond to this objective; the terms of the statute apply generally, granting rights and responsibilities to both men and women, whether or not their relationship conforms to the traditional pattern. As a result, the restrictive definition of spouse does not appear rationally connected to this objective. The exclusion of same-sex spouses also appears to overreach this objective because it denies them access to the domestic contract provisions under Part IV of the Act. Part IV validates domestic contracts, the legitimacy of which was questionable under common law, and imposes formal requirements to ensure that the contracting parties are fully informed. These formal requirements protect spouses from the added risk of duress and lack of knowledge in contracts entered into between members of an intimate relationship characterized by trust. The rationale for allowing couples to contract applies equally to same-sex and heterosexual couples, as does the rationale for the formal requirements. In our view, it is very difficult to justify the exclusion of same-sex couples from the *Family Law Act*, as currently drafted, under section 1.

A third possible objective for excluding same-sex couples from the rights and responsibilities imposed by the *Family Law Act* is to prevent the assimilation of these relationships to a heterosexual model. While the Coalition for Gay and Lesbian Rights in Ontario[70] argues that same-sex couples should receive the same legal recognition and incur the same obligations as heterosexual couples, others argue that same-sex relationships are fundamentally different from heterosexual relationships. For example, in these relationships, partners may not perform traditional gender roles and they may not accept sexual monogamy and emotional exclusivity as ideals. Some commentators argue that inclusion of same-sex couples ignores real differences between couples and may create a division in the gay and lesbian community between those couples whose relationships conform to a heterosexual model and receive recognition, and other couples whose relationships do not fit this model.[71] Others argue that the assimilation of

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[69] The government made this argument, unsuccessfully, in *Leshner v. Ontario (No. 2)*, *supra*, note 16, at D/202, with regard to the restriction of employment benefits to heterosexual couples.

[70] *Happy Families*, *supra*, note 29, at iv.

[71] See Ryder, *supra*, note 24; Didi Herman, "Are We Family?: Lesbian Rights and Women's Liberation" (1990), 28 Osgoode Hall L.J. 789, at 797; Shelley A.M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian and Gay Engagement with Law" (1993), 31 Osgoode Hall L.J. (forthcoming); Brenda Cossman, "Family Inside/OUT", (1994), 44 U.T.L.J. (forthcoming); Nitya Duclos, "Some Complicating Thoughts on Same-sex Marriage" (1991), 1 L. & Sexuality 31; Paula Ettelbrick, "Since when is Marriage a Path to Liberation?", in Suzanne Shumar (ed.), Lesbian *& Gay Marriage* (Philadelphia: Temple University Press, 1992), at 20; and Ruthann Robson and S.E. Valentine, "Lov(h)ers: Lesbians as Intimate Partners and

same-sex relationships to the dominant heterosexual model will reinforce a family form that has played a central role in the oppression of women.[72] An example of this argument is the view that including same-sex spouses under the support obligation, as currently expressed in the Act, might encourage same-sex spouses to enter relationships of dependency.[73]

This justification for excluding same-sex couples from the definitions of spouse used in the *Family Law Act* is difficult to evaluate without more evidence than is available. A recent Canadian study of the relationships of lesbian cohabitants identified points of similarity and distinction.[74] While the lesbian relationships studied were found to have similar qualities of intimacy, these couples had relatively lesser feelings of stability than heterosexual relationships. This may reflect the absence of societal support for lesbian relationships.[75] The lesbian couples were also less economically interdependent than heterosexual couples and shared unwaged household work more equitably. Other commentators have observed that "[m]ost lesbians and gay men are in 'dual-worker' relationships, so that neither partner is the exclusive 'breadwinner' and each partner has some measure of economic independence. Further, examinations of the division of household tasks, sexual behaviour, and decision making in same-sex couples find that clear-cut and consistent husband-wife roles are uncommon".[76] While this material is suggestive, it is not sufficient to confirm the anti-assimilationist position. At the same time, we do not have enough information to discount that view.

In addition to the possible objectives noted above, some of those mentioned in relation to the exclusion of heterosexual couples from the definition of spouse in Parts I and II of the *Family Law Act* may also be

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Lesbian Legal Theory" (1990), 63 Tem. L. Rev. 511.

72 See Michele Barrett and Mary McIntosh, *The Anti-Social Family* (London: Verso, 1982); Michele Barrett, *Women's Oppression Today: Problems in Marxist Feminist Analysis* (London: Verso, 1980); Carol Smart, *The Ties that Bind* (London: Rougledge & Kegan Paul, 1984); Gavigan, *supra*, note 71; and Herman, *supra*, note 71.

73 The authors of the research paper on which this report is based adopt this view: Brenda Cossman and Bruce Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (June 1993), at 144.

74 Margaret S. Schneider, "The Relationships of Cohabiting Lesbian and Heterosexual Couples: A Comparison" (1986), 10 Psychology of Women Q. 234.

75 *Ibid.*, at 238.

76 Letitia Anne Peplau and Susan D. Cochran, "A Relationship Perspective on Homosexuality", in David P. McWhirter et al (eds.), *Homosexuality/Heterosexuality[:] Concepts of Sexual Orientation* (N.Y.: Oxford University Press, 1990) 321, at 344. See, also, Letitia Anne Peplau, "Lesbian and Gay Relationships", in John C. Gonsiorek and James D. Weinrich (eds.), *Homosexuality[:] Research Implications for Public Policy* (Newbury Park, Cal.: Sage, 1991) 177, at 183-84.

relevant. The inclusion of same-sex couples under the *Family Law Act* may trench on the individual autonomy of those who do not wish to incur mutual responsibilities. In the present context, of course, failure to marry is not an indication of such a preference. Unlike many unmarried heterosexual couples, same-sex couples do not have the option of marrying.[77] Presumably, some individuals would prefer to avoid statutory obligations. As with heterosexual couples, however, it can be argued that exclusion from the Act is a disproportionate response and that the Act protects individual autonomy adequately by allowing couples to contract out of its terms. The argument that inclusion of same-sex couples under the Act will increase the potential for competing claims could also be made. As argued in chapter 2, however, we are of the view that there are alternative responses to the problem of competing claims, such as reducing limitation periods and prioritizing the first claim, that would impair the right to a lesser extent.

This brief survey of the potential equality rights challenges to the exclusion of same-sex couples from the definition of spouse in the *Family Law Act* suggests that the constitutionality of the statute is in question. In our view, the exclusion probably violates section 15 and may not be justifiable under section 1. This opinion is more qualified, however, than our conclusion regarding the constitutionality of the exclusion of unmarried heterosexual cohabitants from the *Family Law Act*. This hesitation reflects our uncertainty about the validity of the argument that the Act is designed to respond to inequities that arise in heterosexual relationships, but not in gay and lesbian relationships. We have insufficient evidence before us to test this theory.

We will now consider policy arguments that favour the inclusion of same-sex couples under the Act's protection.

(b) Policy Rationale for Reform

We have identified several considerations that favour including same-sex couples, in some manner, in the *Family Law Act*, as follows:

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[77] *Layland v. Ontario (Minister of Consumer and Commercial Relations)*, *supra*, note 3.

(i) Symbolism of Inclusion

The preamble to the *Human Rights Code*[78] states that it is the public policy of this province to ensure that every person "feels a part of the community and able to contribute fully to the development and well-being of the community and the Province". To further this goal, the Legislature has included sexual orientation as a prohibited ground of discrimination. We believe that granting same-sex couples spousal status under the *Family Law Act* with the corresponding rights and responsibilities would be an important step in making such couples feel part of the community. Inclusion in the most important statute concerning the family would acknowledge the existence of same-sex relationships and ensure that their members receive the same protection from exploitation and incur the same responsibilities as heterosexual spouses.

(ii) Compensation for Economic Contribution

The *Family Law Act* is remedial legislation designed to ensure that spouses are treated fairly when a relationship ends, and that the economic consequences of an intimate relationship are recognized. The rationale for many of the provisions in the Act appears to apply equally to some same-sex relationships. For example, Part I of the Act recognizes that spouses have an equal partnership, deems that their contributions to the wealth accumulated during the relationship are equal, and provides for the equal sharing of that wealth when it ends. We believe that this scheme is applicable to any relationship in which two individuals intermingle their emotional and economic lives. As with heterosexual couples, a statutory scheme would promote the fair, rational, and efficient redistribution of wealth accumulated during a relationship.

Part II of the *Family Law Act* grants a spouse special rights to the family home. These rights respond to the basic need of shelter. They are necessary in a spousal relationship in which a couple share a home. Part II also provides a right to exclusive possession of the shared home where that is necessary for support, to provide stability for children of the relationship, or to protect a spouse from violence at the hands of the other. The need for the statutory rights contained in Part II is as great for same-sex couples who cohabit as for heterosexual couples.

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[78] *Supra*, note 13.

Part III of the *Family Law Act* imposes a mutual support obligation on spouses. A number of rationales for this obligation exist, all of which find some expression in the statute.[79] One view of support is that it should serve the objective of promoting the self-sufficiency of spouses when the relationship breaks down.[80] In situations in which same-sex couples have integrated their economic lives in such a way as to make one partner dependent on another, this rationale for support may be appropriate. Another approach to support is the compensatory model.[81] Under this model, a spouse has an obligation to compensate the other for economic disadvantages suffered because of the breakdown of the relationship.[82] This restitutionary model of support is appropriate to any same-sex relationship that has resulted in an economic advantage for one partner and corresponding disadvantage to the other. Through these approaches, the statute protects individuals from losses due to the economic integration characteristic of spousal relationships. The obligation is not automatic, but will be acted on only when there is justification for an order in the particular circumstances. We believe that these two models of support are appropriate for same-sex couples.

The Act also appears to encompass a third approach to spousal support, that an order should be available purely on the basis of the economic needs of one spouse and the ability of the other to pay.[83] One commentator notes that this model of support "draw[s] upon what are still fairly prevalent social assumptions that it is the primary responsibility of the family to provide a cushion of income security to those citizens who are unable to meet their own needs...".[84] This model does not appear appropriate for same-sex couples, who have not traditionally been considered as a source of income security by society or the state. Because of the fact that, historically, society has not recognized that same-sex couples form a family, they are less likely than heterosexual couples to have arranged their economic circumstances under the assumption that their partner will support them. It would be inappropriate to impose this obligation without evidence supporting a reasonable expectation of support in the particular facts of a

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79 For a complete discussion of spousal support, see Carol J. Rogerson, "The Causal Connection Test in Spousal Support Law" (1989), 8 Can. J. Fam. L. 95, and Carol J. Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act, 1985* (Part I)" (1991), 7 Can. Fam. L.Q. 155.

80 *Family Law Act*, *supra*, note 1, s. 33(8)(c).

81 *Ibid.*, s. 33(8)(a) and (9).

82 The Supreme Court of Canada endorsed this model of support as formulated in the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), in *Moge v. Moge*, [1992] 3 S.C.R. 813.

83 See *Family Law Act*, *supra*, note 1, ss. 30, s. 33(9).

84 Rogerson, "The Causal Connection Test in Spousal Support Law", *supra*, note 79, at 108.

relationship. If the facts reveal that a same-sex couple have arranged their lives as an economic unit, it may be appropriate for one partner, rather than for the state, to bear the primary obligation of support to the other. As currently applied, however, the needs/ability model of support does not appear appropriate for same-sex couples.

Part IV of the Act guarantees the right of spouses to arrange their affairs according to a private contract. This Part imposes formal requirements on such contracts. These are necessary because of the particular vulnerability individuals have when contracting with another in the context of an intimate relationship. In our view, same-sex spouses should have the same rights to govern their relationship by private agreement. Further, it appears that the same need for safeguards arises in these relationships as in those of heterosexual couples.

Part V of the *Family Law Act* permits certain family members (spouse, children, grandchildren, parents, grandparents, brothers, and sisters) to sue in tort for damages when an immediate relative is injured or killed through the negligence of a third party. The action may be for pecuniary loss or for the loss of guidance, care, and companionship. Through this Part, the Legislature has responded to the special needs of immediate family members who are economically and emotionally interdependent. Relationships of same-sex couples have the same characteristics of intimacy as those of heterosexual couples and should receive the same recognition. Many may also have the characteristics of economic interdependency.

3. OPTIONS FOR REFORM

The rationale for many of the provisions of the *Family Law Act* appears to apply to same-sex couples, at least to the extent that their relationships share characteristics common to heterosexual couples. In the interest of fairness, therefore, same-sex couples should receive some legislative recognition. Anti-assimilationist commentators present a powerful countervailing viewpoint, however, that we must take into account when considering options for reforming the law. Historical and continuing discrimination against gay men and lesbians has hampered attempts to learn about the structure of same-sex relationships, and it may well have hampered the formation of such households. Our lack of knowledge about the form that such relationships take and the expectations of the parties involved prompts us to adopt a cautious approach to reform. At the same time, the existing law in which same-sex couples are completely excluded from the *Family Law Act*, appears to violate the principle of equality expressed in the *Human Rights Code* and enshrined in our constitution. In our view, this fact alone makes reform imperative.

Several approaches to including same-sex couples within the scope of the *Family Law Act* are possible. They are not mutually exclusive.

(a) Contract

Same-sex couples do not currently have the right to enter into domestic contracts under Part IV of the *Family Law Act*. A modest reform option would be to grant same-sex couples the same right to enter into domestic contracts under Part IV of the Act currently held by unmarried heterosexual couples.[85] While respecting individual autonomy, this reform would facilitate the ability of same-sex couples to organize their affairs. Statutory recognition of cohabitation agreements, separation agreements, and parenting agreements[86] entered into by same-sex partners would allow couples to determine their own rights and responsibilities, without forcing them to pattern their relationship on a stereotypical heterosexual model. The statutory limitations on domestic contracts (for example, that the best interests of a child always override an agreement between parents)[87] would apply equally to domestic contracts between same-sex partners.

Accordingly, the Commission recommends that section 53 of the *Family Law Act* should be amended to permit same-sex couples to enter into cohabitation agreements. Similarly, the Commission recommends that section 54 of the *Family Law Act* should be amended to permit same-sex couples to enter into separation agreements, and section 59 of the *Family Law Act* should be amended to permit same-sex couples to enter into parenting agreements.

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[85] *Family Law Act*, *supra*, note 1, s. 53(1) now provides:

> A man and a woman who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,
>
> (a) ownership in or division of property;
>
> (b) support obligations;
>
> (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
>
> (d) any other matter in the settlement of their affairs.

[86] Later in this report, the Commission recommends that the term "paternity agreement" should be replaced with the term "parenting agreement". See *infra*, ch. 4, sec. 6.

[87] *Family Law Act*, *supra*, note 1, s. 5(1).

Including same-sex couples within the terms of Part IV of the *Family Law Act* alone would be an insufficient reform. Although agreements have the advantage of allowing couples to individualize their mutual rights and responsibilities, couples entering long-term intimate relationships may not have the foresight to provide for every eventuality. Domestic contracts are an effective tool for parties who know their rights and have equal negotiating power, but individuals may not have full information about their legal rights, nor a full appreciation of the potential economic consequences of a relationship. While we recommend that all same-sex couples be included in Part IV of the Act, it is our view that more extensive reforms are necessary.

(b) Registered Domestic Partnership

Some same-sex couples may wish to share the mutual rights and responsibilities imposed by the *Family Law Act* on married couples. One means by which this result might be achieved is to provide individuals with the option of becoming Registered Domestic Partners. This approach would foster equality by granting same-sex couples the choice available to heterosexual couples, as a consequence of marriage, of having their relationship governed by the *Family Law Act*. The option of registering a domestic partnership could be available to any two individuals, irrespective of the nature of their relationship. It is not necessary to restrict the right to opt in to the legislative scheme to individuals cohabiting in a conjugal relationship. For example, two sisters or two friends could choose to have their economic relationship governed by the terms of the *Family Law Act*, both during its course and at its end. If the opportunity to register as domestic partners is open to all forms of relationship, registrants will not have to reveal intimate details about their relationship in order to acquire status. In our view, like married couples, Registered Domestic Partners should have the option of contracting out of some or all of the provisions of the *Family Law Act*, subject to the same restrictions imposed on married couples.[88]

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[88] Under Part IV of the *Family Law Act*, *ibid.*, any agreement to limit a spouse's rights under Part II (regarding the matrimonial home) is unenforceable: s. 52(2). These include rights to possession of the home and the limitation of the right of the titleholder of the home to encumber or dispose of it without the permission of the other spouse. These rights recognize the special importance of the home as shelter for the family. Under Part II, a spouse may seek exclusive possession. This right is of value in many circumstances, perhaps most significantly in cases of domestic violence. As well, a court may grant exclusive possession as a form of support or to serve a child of the relationship's need for stability. We believe that these rights are as essential for Registered Domestic Partner as for married spouses.

Several jurisdictions have introduced Registered Domestic Partnerships.[89] From these examples, we can identify the need for certain requirements. A scheme would have to include a system for the registration of partnerships. Both parties would have to file a registration form, witnessed and signed, that they wish to enter an economic partnership of primary importance in each other's lives and that they meet all statutory prerequisites for registration. These might include a statement that neither of the parties is married or the Registered Domestic Partner of another person, and that they are at least eighteen years of age. Legislation would also have to provide for the revocation of a Registered Domestic Partnership. We suggest that Registered Domestic Partners should be able to revoke the registration unilaterally, on notice to the other partner.

The introduction of a Registered Domestic Partnership scheme would allow individuals to choose to incur the economic rights and obligations associated with marital status, without affecting the institution of marriage, which has particular cultural and religious significance. This is of added importance because the constitutional jurisdiction to regulate the legal capacity to marry lies with the federal government.[90]

Provincial authority over family law falls within the province's jurisdiction over property and civil rights.[91] This jurisdiction empowers a province to attach proprietary and other rights to marital or other relational status.[92] We have considered the possibility that legislation enacting a Registered Domestic Partnership scheme could be challenged as a colourable attempt to trench on the federal marriage power. In our view, however, such a challenge would have a limited chance of success. The province has a

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89 See *supra*, note 4.

90 *Constitution Act, 1867*, s. 91(26). The provinces have jurisdiction in relation to the solemnization of marriage: *ibid.*, s. 92(12). For judicial commentary, see *Re Marriage Legislation in Canada*, [1912] A.C. 880, 7 D.L.R. 629 (P.C.); *Kerr v. Kerr*, [1934] S.C.R. 72; [1934] 2 D.L.R. 369; and *Attorney General of Alberta v. Underwood*, [1934] S.C.R. 635, [1934] 4 D.L.R. 167. See, also, Leslie Katz, "The Scope of the Federal Legislative Authority in Relation to Marriage" (1975), 7 Ottawa L. Rev. 384; Bora Laskin, *Canadian Constitutional Law*, 5th ed. by Neil Finkelstein (Toronto: Carswell, 1986), at 670-72; and S. Ian Bushnell, "Family Law and the Constitution" (1978), 1 Can. J. Fam. L. 202, at 208-09.

91 *Constitution Act, 1867*, s. 92(13).

92 Bushnell, *supra*, note 90, at 210 states that: "Dominion authority over the family is concerned with the marriage relationship, and so long as provincial legislation does not disturb that relationship, it will be valid". In support of this, Bushnell cites *Rousseau v. Rousseau*, [1920] 3 W.W.R. 384 (B.C.C.A.); *Langford v. Langford* (1936), 50 B.C.R. 303, [1936] 1 W.W.R. 174 (S.C.); and *Holmes v. Holmes* (1923), 16 Sask. L.R. 390, [1923] 1 D.L.R. 294 (C.A.). The province has the jurisdiction to impose a support obligation on an individual: see *Re Sanders and Moores* (1974), 15 N.S.R. (2d) 624, 53 D.L.R. (3d) 153 (T.D.) and *Lee v. Lee* (1920), 16 Alta. L.R. 83, 54 D.L.R. 608 (App. Div.).

general power to legislate in the field of property and civil rights with respect to married and unmarried persons.[93] It appears most unlikely that the creation of a new form of non-marital relationship for the purposes of regulating the parties' mutual rights and responsibilities, in a well-defined field of provincial jurisdiction, could be characterized as an intrusion on the federal marriage power. The introduction of a Registered Domestic Partnership scheme would have no impact on the legal capacity to marry, nor would it affect the determination of spousal status for the purpose of federal law.

The Commission recommends that legislation should be enacted to establish a system permitting the registration of Registered Domestic Partnerships. The Commission further recommends that the *Family Law Act* should be amended to provide that Registered Domestic Partners have all of the rights and obligations available to spouses throughout the Act.

The Commission also recommends that, subject to the recommendation that follows, any two persons should be permitted to become Registered Domestic Partners upon filing a witnessed and signed registration form. Moreover, the Commission recommends that individuals should be permitted to become Registered Domestic Partners, provided that they are not married, or the Registered Domestic Partner of others, and provided that they are at least eighteen years of age. We have concluded that the Act should also provide for circumstances in which a partner is in breach of these restrictions. Accordingly, the Commission recommends that where one or both of the persons entering into a Registered Domestic Partnership have failed to comply with these restrictions, the Registered Domestic Partnership should be void. To avoid unfairness, we suggest that, as with a void marriage, a participant in good faith in a void partnership should be able to assert rights under the Act. The Commission recommends, therefore, that the *Family Law Act* should be amended to provide that persons who have entered, in good faith, into a Registered Domestic Partnership that is void in accordance with the above recommendation should be entitled to assert all of the rights under the Act that they would have been entitled to assert, had the registered Domestic Partnership not been void.

Finally, the Commission recommends that a Registered Domestic Partner should be entitled to revoke the registration unilaterally, upon giving notice to the other partner.

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[93] This point is illustrated by the absence of case law on the validity of provincial laws that grant unmarried heterosexual couples spousal status.

The enactment of a Registered Domestic Partnership scheme will not resolve all of the equality and fairness concerns noted above. No doubt some same-sex couples will not register a partnership, just as some heterosexual couples do not marry. Among this group will be individuals who have made a conscious and shared decision to avoid the mutual rights and responsibilities imposed by the *Family Law Act*. Others, however, will structure their lives as an economic partnership, but will neglect to register a partnership or enter a domestic contract. If these couples are not included in the *Family Law Act*, a potential for exploitation exists. Accordingly, we now turn to consider the possibility that spousal status might be ascribed to unregistered same-sex couples.

(c) Ascribed Spousal Status

The *Family Law Act* could be amended to provide that unregistered same-sex couples are treated in the same fashion as unmarried (or unregistered) heterosexual couples. In chapter 2 of this report, we recommended that unmarried heterosexual couples, as defined in the Act, should be treated in the same fashion as married persons. Including unregistered same-sex cohabitants in the Act as well would satisfy the demands of formal equality, but it is unclear whether it would meet the standard of substantive equality expressed in human rights and constitutional jurisprudence. The property and support provisions of the *Family Law Act* are designed to ensure that a couple who live in a relationship of economic interdependence, characterized by trust and the pursuit of mutual goals, share equally in the economic benefits of the relationship. The statute reflects the assumption that spouses act in their joint economic interest, rather than in pursuit of independent goals. The rights to equalization of property and possession of the family home, and the mutual obligation of support, are intended to ensure that neither partner suffers unfair economic consequences from the breakdown of a relationship. The same rationale applies to all intimate relationships in which the parties form an economic partnership. We believe that the imposition of this scheme on married couples and unmarried heterosexual cohabitants whose relationships bear many of the characteristics of marriage is appropriate. This scheme might also be appropriate for same-sex couples who have intimate relationships that are also primary economic partnerships. However, we do not have adequate evidence before us about the nature of relationships between same-sex cohabitants and the expectations of members of those relationships to justify imposing these rights and obligations upon them.

We realize that excluding unregistered same-sex couples from the scope of the *Family Law Act* may leave some individuals, who have made uncompensated contributions to their partner's wealth, without an accessible

and predictable means of redress in the event that the relationship breaks down. Such parties would be left to those common law remedies briefly described elsewhere in this report.[94] On the other hand, the ascription of spousal status to all such couples may also lead to unfairness, if, as seems possibly to be the case, a significant number do not organize their affairs as economic partnerships. The provisions of the *Family Law Act* are designed, in significant measure, to give effect to the sorts of reasonable expectations and to compensate for the kinds of uncompensated contributions that are liable to occur in marital relationships and in unmarried heterosexual relationships that follow a similar pattern. The types of reasonable expectations and uncompensated contributions that arise in such relationships appear to rest on gender-based assumptions concerning such matters as the division of labour within the family setting and the making of career choices and other economic decisions. It is against this background that we have recommended elsewhere in this report that spousal status be ascribed to unmarried heterosexual couples in certain circumstances. To be sure, there may be many such couples who have made a conscious decision to avoid the obligations assumed to accompany marriage. Having made this decision, however, such couples would, under our recommendations, be free to enter a binding agreement to contract out of these obligations. For the couple that has not made such a decision, however, the general patterns to which we refer raise, in our view, a significant risk that parties who are in need of the kinds of protection afforded by the Act will not receive them. This risk is compounded by the fact that, under existing law, such couples are brought within the Act to a limited degree, thus creating for some, at least, the misleading impression that all of the Act's protections for married couples are available to them.

We have not been able to conclude the same considerations apply or apply to the same degree to same-sex couples. It may be that some, perhaps many, same-sex relationships follow a similar pattern to that which, as we have suggested above, is liable to occur with married and unmarried heterosexual couples. As we have indicated, however, the evidence available to us with respect to general patterns is ambiguous.[95] In our view, in the absence of better information than is now available to the Commission with respect to general patterns, it would be inappropriate to impose the provisions of the *Family Law Act* upon same-sex couples who have neither entered an agreement to this effect nor made a decision to become Registered Domestic Partners. It would be inappropriate to impose substantial economic rights and obligations on a group of citizens without

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[94] See *infra*, ch. 2, sec. 1(b).

[95] See *supra*, ch. 3, sec. 2(a)(ii).

adequate information about their experience and needs. We suggest that consultation with members of the gay and lesbian community is essential before this step is taken. Accordingly, we have concluded that we cannot recommend that same-sex couples who choose not to register should have spousal status ascribed to them by legislation.

The Commission, therefore, recommends that the Legislature should acquire further information concerning attitudes and expectations within the gay and lesbian community before ascribing spousal status under the *Family Law Act* to same-sex couples who have not exercised their right to become Registered Domestic Partners.

If a decision is taken to include same-sex couples in the *Family Law Act* on an ascriptive basis, we caution against attempting to achieve this by making the definition of common-law spousal status gender-neutral. The existing definition of spousal status found in Part III of the *Family Law Act* states:

> 29. In this Act,
>
> ....
>
> "spouse" means a spouse as defined in subsection 1(1), and in addition includes either of a man and woman who are not married to each other and have cohabited,
>
> (a) continuously for a period of not less than three years, or
>
> (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

"Cohabit" is a defined term in the Act:

> 1.—(1) In this Act,
>
> ....
>
> "cohabit" means to live together in a conjugal relationship, whether within or outside marriage;

This definition was devised in the context of heterosexual relationships, and courts have interpreted "conjugal relationship" in a manner that is especially problematic for same-sex couples. One requirement of "conjugality" is that

partners hold themselves out to the public as a couple.[96] This requirement is inappropriate for same-sex couples who may have genuine concerns about experiencing discrimination if they "come out" in the community as a couple. This requirement is also of questionable relevance to the objective of the *Family Law Act* with respect to heterosexual cohabitants, but if the Legislature chooses to ascribe spousal status to same-sex couples, the definition of the term "spouse" should be amended to account for the above concerns.

We also wish to note that there are certain potential problems with ascribing spousal status to same-sex couples for the purposes of the mutual support obligation imposed by Part III of the *Family Law Act*, as currently drafted. While the self-sufficiency and compensatory models of support may be applicable to the relationships of gay men and lesbian women, the needs/ability model does not. The latter approach, which bases a support order on the needs of the claimant and the ability of the respondent to pay, reflects a view that economic responsibility to support a spouse, or former spouse, depends simply upon marital status and need not be connected to the circumstances of the particular relationship between the parties. We do not recommend that this model of support should be imposed on same-sex couples.

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[96] See *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376, at 382 (Ont. Dist. Ct.) and *Routley v. Dimitrieff* (1982), 36 O.R. (2d) 302, at 304 (Master) ("In my view, living together in a conjugal relationship requires something like marriage, including living in the same place, eating together as circumstances allow, being seen in public as a couple, and representing each other to be members of one family group, or at least some of these features".).

CHAPTER 4

CONSEQUENTIAL AMENDMENTS

Our recommendations for reform of the *Family Law Act*[1] will necessitate some consequential amendments. The inclusion of new forms of intimate relationship under the Act will require amendment to the definition of spouse, to the determination of commencement and valuation dates for the purposes of calculating equalization under Part I, and to the limitation period, as well as changes to some terminology used in the Act. In this chapter, we will consider changes mandated by our recommendations.

1. DEFINITION OF SPOUSE

Our recommendations to expand the application of the *Family Law Act* require changes to the statutory definition of spouse. Currently, the Act uses more than one definition. For the Act as a whole, "spouse" is defined as follows:

> 1.—(1) In this Act,
>
> ....
>
> "spouse" means either of a man and woman who,
>
> (a) are married to each other, or
>
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.

For the purposes of the support obligation, "spouse" is defined in Part III as follows:

> 29. In this Part,
>
> ....

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[1] R.S.O. 1990, c. F.3.

> "spouse" means a spouse as defined in subsection 1(1), and in addition includes either of a man and woman who are not married to each other and have cohabited,
>
> (a) continuously for a period of not less than three years, or
>
> (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

"Cohabit" is a defined term in the Act:

> 1.—(1) In this Act,
>
> ....
>
> "cohabit" means to live together in a conjugal relationship, whether within or outside marriage;

This definition also applies for the purposes of defining those who may make a claim for damages in tort for the death or injury of a family member under Part V of the Act.

Earlier we recommended the extension of all of the rights and obligations available under the *Family Law Act* to Registered Domestic Partners.[2] One means by which this might be accomplished is to include Registered Domestic Partners within the definition of the term "spouse" found in section 1(1) of the Act. In our view, this would appear to be unnecessary. We have already recommended, in chapter 3, that the *Family Law Act* should be amended to provide that Registered Domestic Partners have all of the rights and obligations available to spouses, throughout the Act. This would likely be accomplished most conveniently by including a provision to that effect in a new Part, added to the Act, dealing with Registered Domestic Partners generally.[3]

The Commission also recommended that unmarried heterosexual cohabitants should be included in the definition of spouse throughout the Act. This can best be achieved, in our view, by introducing the expanded definition of spouse found in Part III of the Act to section 1(1), so that this definition applies throughout the Act. Some difficulties have arisen, however,

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[2] *Supra*, ch. 3, sec. 3(b).

[3] For recommendations concerning the implications of introducing a Registered Domestic Partnership scheme for pension law, see the Ontario Law Reform Commission *Report on Pensions as Family Property*[:] *Valuation and Division* (1993). Under the federal *Income Tax Act*, R.S.C. 1952. c. 148, as substantially reenacted by S.C. 1970-71-72, c. 63, as am., spousal status confers both tax advantages and disadvantages. It is our view that Registered Domestic Partners should receive equivalent treatment.

in the application of the definition of spouse used in Part III of the Act. The statutory phrase "conjugal relationship", which is introduced into the definition by the requirement that the spouses "cohabit",[4] directs the courts to consider whether a couple has a relationship that is functionally equivalent to marriage.[5] Commentators have criticized a tendency in the jurisprudence for courts to interpret "conjugal relationship" against an idealized model of marriage, placing considerable emphasis on the existence of economic dependency, a sexual relationship, and the parties being identified in public as a couple.[6] This jurisprudence propagates a stereotypical model of marriage that fails to account for the existing diversity of marital relationships. Reliance on this approach also leads courts to engage in inquiries into the intimate details of relationships, intruding on personal privacy. The tendency to measure common law relationships against a stereotypical view of marriage is regrettable and should be resisted. The Commission also believes that intrusive examination of the intimate details of a relationship is undesirable. Yet, functional similarities between marriage and common-law relationships are central to the recommendation to include the latter in the *Family Law Act*. The Commission would therefore not recommend removing the requirement that a couple live in a "conjugal relationship" unless that phrase is replaced with a defining term that also captures the requirement of functional similarity.

The definition of spouse in Part III of the Act also includes a requirement that an unmarried couple must have lived together for at least

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[4] The definition of the term "cohabit" contained in s. 1(1) of the *Family Law Act* is reproduced *supra*, this ch.

[5] See *Re Feehan and Attwells* (1979), 24 O.R. (2d) 248, 1 F.L.R.A.C. 322 (Co. Ct.). This approach was approved by the Ontario Court of Appeal in *Re Sanderson and Russell* (1979), 24 O.R. (2d) 429, 99 D.L.R. (3d) 713 (C.A.).

[6] *See Molodowich v. Pentinnen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.); *Routley v. Dimitrieff* (1982), 36 O.R. (2d) 302 (Master); and *Re Harris and Godkewitsch* (1983), 41 O.R. (2d) 779 (Prov. Ct. Fam. Div.). Brenda Cossman and Bruce Ryder criticize this approach in the study paper for this report: *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (June 1993), at 160-61. They suggest removing "conjugal relationship" as an element of the definition. As an alternative they propose a new definition of spouse to include two persons who "have lived together continuously for a period of not less than three years in a relationship that is of primary importance in each other's lives", with "live together" defined as "live together in an economic partnership, whether within or outside marriage". This new definition presents new problems, however. First, the meaning of the term "economic partnership" is unclear. Individuals may have difficulty demonstrating to a court that such a "partnership" existed. Second, even when modified by the phrase "in a relationship ... of primary importance in each other's lives" the proposed definition potentially applies to many relationships that are not currently within the purview of the *Family Law Act*, *supra*, note 1. It could conceivably apply, for example, to business partnerships, as well as to relationships between parents and their children, or between friends. For these reasons, the Commission does not endorse this proposal.

three years, or in a relationship of some permanence if they are the natural or adoptive parents of a child. These requirements are designed to provide a rough measure of the time at which a couple will have become economically interdependent and, therefore, require the protection of the *Family Law Act*. Although a defined period does provide a useful tool for both parties and courts to determine who the Act covers, the choice of a particular period—such as three years—is necessarily somewhat arbitrary. Inevitably, the choice of a particular time period will exclude some individuals whose relationships fall just short of the limit and thus appear capricious. Moreover, unmarried heterosexual couples are confronted with a lack of uniformity in the time periods prescribed in the definition of "spouse" set out in various statutory schemes. Thus, as noted above, for the purposes of the *Income Tax Act*,[7] spousal status attaches after twelve months of cohabitation. Under the Ontario *Workers Compensation Act*,[8] spousal status is similarly acquired after one year. The definition of "spouse" in the Ontario Human Rights Code[9] sets no minimum time period for cohabitation. And so on. Similar variation in the basic definition of spousal relationship can be found across the Canadian provinces and territories.[10] The definition of cohabitation varies across the country from a requirement of "not less than five years" in Manitoba to a definition in the Yukon that sets no minimum period but requires a "relationship of some permanence". In our view, there would be considerable virtue in establishing uniformity in these matters, at least within the province. On the other hand, we are reluctant to recommend modification of the existing three-year requirement in the *Family Law Act*. While we do not view the current three-year period as necessarily ideal, we do believe that there is some value to preserving the existing time period in order to avoid the public confusion that might arise if the law is altered.

The second branch of the definition includes a man and a woman in "a relationship of some permanence if they are the natural or adoptive parents of a child". This definition does not have the advantage of including a time period as a proxy for evidence that the couple has a relationship of economic interdependence meriting the imposition of rights and responsibilities under the Act. The threshold for finding a "relationship of some permanence" appears to be low if a couple has cohabited for even a short period.[11] This

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7 *Supra*, note 3, s. 252(4).

8 R.S.O. 1990, c. W.11, s. 1(1).

9 R.S.O. 1990, c. H-19, s. 10(1).

10 Nicholas Bala and Marlene Cano, "Unmarried Cohabitation in Canada: Common Law and Civilian Approaches to Living Together" (1989), 4 Can. Fam. L.Q. 147, at 190-93.

11 *Ibid.*, at 203.

definition reflects the fact that the existence of a child has an immediate economic impact on the parents. The presence of a child may result in the need for spousal support and the need for protection of possessory rights in a family home under Part II. As well, shared responsibility for a child will create the circumstances of a joint economic partnership in many cases. In our view, therefore, it is equitable for the courts to set a low threshold. We should add that we do not believe that the inclusion of such couples within the definition of spouse for the purposes of Part I will result in a substantial equalization payment in most cases, if all our recommendations in the companion *Report on Family Property Law* are enacted. We reach this conclusion because, under Part I of the Act, in general, only wealth accumulated during the relationship is equalized. Under the existing legislation, the value of a matrimonial home must always be included in the calculation, even if one spouse owned the house before the relationship commenced. We have recommended, however, that the matrimonial home should be treated in the same manner as other assets in our companion report. If the relationship is of short duration, therefore, the value equalized will in most cases be insignificant.

The introduction of a time period as an alternate test for couples who are parents of a child but have not cohabited for three years could simplify some cases. We suspect, however, that the result of such an amendment would be the diversion of disputes into the often complicated question of when cohabitation commenced. Accordingly, we endorse the continued use of the phrase "relationship of some permanence" as the test for spousal status in this context.

As a final note, we wish to draw attention to the anomalous restriction of this definition to those who are the "natural or adoptive" parents of a child. In the context of modern reproductive technology, the term "natural parent" appears outdated. Of more significance, it unnecessarily excludes "social parents" who are recognized by the general definition of "parent" found in section 1(1) of the Act:

> 1.—(1) In this Act
>
> ....
>
> "parent" includes a person who has demonstrated a settled intention to treat a child as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

The Commission therefore recommends that, for the purposes of our earlier recommendation,[12] the definition of "spouse" contained in section 1(1) of the *Family Law Act* should be amended to include either of a man and woman who are not married to each other, and have cohabited continuously for a period of not less three years [or some other period of time prescribed by statute], or in a relationship of some permanence, if they are the parents of a child. This recommendation would remove the current requirement for cohabiting heterosexual spouses that the spouses be the "natural or adoptive" parents of a child.

2. COMMENCEMENT DATE

To equalize the value of family property, the statute must identify a fixed commencement date for the calculation. Part I now provides, through the definition of "net family property" in section 4(1), that the entitlement to share in family property begins at the date of marriage. The inclusion of new types of relationships in the *Family Law Act* will require that the definition of net family property be amended. One option is to define the relevant date as the earliest of the date of marriage, the date of the registration of a Registered Domestic Partnership, or the date on which a couple began to live together. In our companion *Report on Family Property Law*, we recommend that spouses covered by Part I should not be able to seek remedial constructive trusts for unjust enrichment. In view of that recommendation, it seems only fair to provide that spouses and Registered Domestic Partners receive equalization rights for the period during which they lived together prior to marriage or registration. If the Legislature should choose not to abolish access to the remedial constructive trust, this provision will reduce the incentive for spouses and Registered Domestic Partners to make unjust enrichment claims, with their cost and complexity, with respect to property owned by the other spouse or partner prior to marriage or registration. This proposal might increase litigation costs in those cases in which the date at which spouses or partners began to live together is difficult to determine. On balance, however, we have concluded that married spouses and Registered Domestic Partners should be entitled to rely on the earlier date.

Accordingly, the Commission recommends that the definition of "net family property" contained in section 4(1) of the *Family Law Act* should be amended to provide that the following is to be deducted from the value of the property owned by a spouse on the valuation date:

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[12] *Supra*, ch. 2, sec. 3.

(a) in the case of married spouses and Registered Domestic Partners, the value of all property owned on the earlier of,

(i) the date of marriage or the date of registration of a Registered Domestic Partnership; and

(ii) the date on which the couple began to live together; and

(b) in the case of spouses who are not married, the value of all property owned on the date on which the spouses began to live together.

3. VALUATION DATE

The definition of "valuation date" must be expanded to accommodate the inclusion of Registered Domestic Partners. The Commission recommends that, in order to correspond with the provision for married spouses, the definition of "valuation date" contained in section 4(1) of the *Family Law Act* should be amended to mean, in the case of Registered Domestic Partners, the earliest of the date the partners separate and there is no reasonable prospect that they will resume living together, and the date the registration is revoked.

4. LIMITATION PERIOD

The inclusion in the *Family Law Act* of Registered Domestic Partners, and unmarried heterosexual couples who meet the definition of spouse, will necessitate amendment to the limitation provision for Part I of the Act. Section 7(3) now imposes a limitation period on applications for equalization to the earliest of two years after divorce, six months after death, and six years after separation with no reasonable prospect of resuming cohabitation. To include Registered Domestic Partners, section 7(3) should be amended to impose a limitation period on applications for equalization to the earliest of two years after the revocation of a registration, six months after death, and six years after separation. However, in our view, a six-year limitation period appears excessive for unmarried spouses who may have lived together for only three years or even less, if they have a child. For unmarried heterosexual couples, a shorter limitation period, of perhaps only two years, appears adequate.

Accordingly, the Commission recommends that section 7(3) of the *Family Law Act* should be amended to provide that an application for equalization of net family properties shall not be brought after the earliest of,

(a) in the case of Registered Domestic Partners:

(i) two years after the partnership is terminated by revocation of the partnership;

(ii) six years after the partners separate and there is no reasonable prospect that they will resume living together, and

(iii) six months after the first partner's death;

(b) in the case of unmarried spouses:

(i) two years after the spouses separate and there is no reasonable prospect that they will resume living together, and

(ii) six months after the first spouse's death.

Currently, the rights of a married spouse to possession of the family home terminate at divorce under section 19(2) of the Act. This section should be expanded to apply to Registered Domestic Partners and unmarried heterosexual spouses. We believe that this section should also be amended to ensure that these rights exist when they are most likely to be needed, that is, in the immediate period after the breakdown of the relationship. This is not a problem for married couples, since a divorce is not immediately available. According to our recommendations, however, a Registered Domestic Partnership may be revoked unilaterally. We recommend, therefore, that section 19(2) of the *Family Law Act* should be amended to provide that a right to possession of the family home[13] terminates at the earliest of the date of divorce, two years after a Registered Domestic Partnership is terminated by revocation of the partnership, or two years after a separation where there is no reasonable prospect that the spouses or Registered Domestic Partners will resume living together, unless a separation agreement or court order provides otherwise.

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[13] Later in this chapter we recommend that the term "matrimonial home" be replaced with the term "family home". See *infra*, this ch., sec. 6.

5. RETROACTIVITY

The provisions of Part I of the *Family Law Act* apply retroactively to those who married or acquired property before its enactment. We believe that the policy of retroactivity embodied in the current Act should be applied equally to all those who would, under our proposed reforms, meet the definition of spouse in the Act. We appreciate that this may represent an imposition of obligations on some individuals who might have wished to avoid legal obligations of this kind. The same concern arose, however, with the initial enactment of the *Family Law Act*, which imposed obligations retrospectively on married persons. In our view, it is justifiable to impose these obligations retroactively because the equalization scheme embodied in the Act represents a fair division of family property that is preferable to the common law remedies and that satisfies the reasonable expectations of most couples. These are, in our view, beneficial reforms which ought to take effect as quickly as possible. In any case, we note that spouses who separate before the enactment of the proposed amendments would remain liable only for the limited period of two years specified under the proposed amended version of section 7(3) of the Act.

Accordingly, the Commission recommends that section 16(1) of the *Family Law Act* should be amended to provide that Part I of the Act applies to property owned by spouses, whether they became spouses, within the meaning of the expanded definition recommended earlier, before or after the effective date of the legislation by which the recommendations made in this report are implemented, and whether the property was acquired before or after that day. The Commission further recommends that the principles of retroactivity embodied in section 70(1) of the *Family Law Act* should be applied, with any necessary adjustments, to the legislative changes recommended in this report.

6. CONSEQUENTIAL CHANGES TO TERMINOLOGY IN THE ACT

Our recommendations to expand the scope of the *Family Law Act* will also necessitate some changes to the terminology used in the Act. Both the preamble and section 5(7), as currently drafted, refer exclusively to marriage. We recommend that the preamble and section 5(7) of the *Family Law Act* should be amended to replace the term "marriage" with the term "family relationship". We recommend that the preamble to the Act should be further amended to provide as follows:

> Whereas it is desirable to *recognize and accommodate the diversity of family forms*; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within *family relationships* and to recognize

> *family relationships as equal partnerships*; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children;

Similarly, the term "matrimonial home" is inappropriate if the scope of the application of Parts I and II is expanded to protect unmarried spouses. Accordingly, we recommend that the *Family Law Act* should be amended to replace the term "matrimonial home" with the term "family home". As well, the phrase "paternity agreement", in our view, is too narrow. We therefore recommend that the *Family Law Act* should be amended to replace the term "paternity agreement" with the term "parenting agreement". Finally, we believe that the term "dependant", used in Parts III and V of the Act, has demeaning connotations and should be replaced. Accordingly, we recommend that the *Family Law Act* should be amended to replace the term "dependant", as follows:

(a) in Part III of the Act, with a term that has a neutral connotation, for example, the term "applicant"; and

(b) in Part VI of the Act, in the title and marginal notes, with the term "family members".

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

CHAPTER 2 UNMARRIED HETEROSEXUAL COUPLES

1. The definition of "spouse" contained in section 1(1) of the *Family Law Act* should be amended to include unmarried heterosexual spouses (see recommendation 6). This would ensure that such spouses have the same rights and responsibilities as married spouses, throughout the Act. (at 31)

CHAPTER 3 SAME-SEX COUPLES

2. (1) Section 53 of the *Family Law Act* should be amended to permit same-sex couples to enter into cohabitation agreements.

   (2) Section 54 of the *Family Law Act* should be amended to permit same-sex couples to enter into separation agreements.

   (3) Section 59 of the *Family Law Act* should be amended to permit same-sex couples to enter into parenting agreements (see recommendation 14). (at 52)

3. (1) Legislation should be enacted to establish a system permitting the registration of Registered Domestic Partnerships.

   (2) Subject to paragraph (3) below, any two persons should be permitted to become Registered Domestic Partners upon filing a witnessed and signed registration form.

   (3) Individuals should be permitted to become Registered Domestic Partners, provided that they are,

      (a) not married, or the Registered Domestic Partner of another; and

      (b) at least eighteen years of age.

(4) Where one or both of the persons entering into a Registered Domestic Partnership have failed to comply with the requirements contained in recommendation 3(3), the Registered Domestic Partnership should be void.

(5) A Registered Domestic Partner should be entitled to revoke the registration unilaterally, upon giving notice to the other partner. (at 55)

4. The *Family Law Act* should be amended to provide as follows:

(a) Registered Domestic Partners have all of the rights and obligations available to spouses, throughout the Act; and

(b) persons who have entered, in good faith, into a Registered Domestic Partnership that is void in accordance with recommendation 3(4) above should be entitled to assert all of the rights under the Act that they would have been entitled to assert, had the Registered Domestic Partnership not been void. (at 55)

5. The Legislature should acquire further information concerning attitudes and expectations within the gay and lesbian community before ascribing spousal status under the *Family Law Act* to same-sex couples who have not exercised their right to become Registered Domestic Partners. (at 58)

CHAPTER 4 CONSEQUENTIAL AMENDMENTS

6. For the purposes of recommendation 1, the definition of "spouse" contained in section 1(1) of the *Family Law Act* should be amended to include either of a man and woman who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years [or some other period of time prescribed by statute], or

(b) in a relationship of some permanence, if they are the parents of a child.

This recommendation would remove the current requirement for cohabiting heterosexual spouses that the spouses be the "natural or adoptive" parents of a child. (at 65)

7. The definition of "net family property" contained in section 4(1) of the *Family Law Act* should be amended to provide that the following is to be deducted from the value of the property owned by a spouse on the valuation date:

   (a) in the case of married spouses and Registered Domestic Partners, the value of all property owned on the earlier of:

      (i) the date of marriage or the date of registration of a Registered Domestic Partnership; and

      (ii) the date on which the couple began to live together; and

   (b) in the case of spouses who are not married, the value of all property owned on the date on which the spouses began to live together. (at 65-66)

8. The definition of "valuation date" contained in section 4(1) of the *Family Law Act* should be amended to mean, in the case of Registered Domestic Partners, the earliest of the following dates:

   (a) the date the partners separate and there is no reasonable prospect that they will resume living together; and

   (b) the date the registration is revoked. (at 66)

9. Section 7(3) of the *Family Law Act* should be amended to provide that an application for equalization of net family properties shall not be brought after the earliest of:

   (a) in the case of Registered Domestic Partners:

      (i) two years after the partnership is terminated by revocation of the partnership;

      (ii) six years after the partners separate and there is no reasonable prospect that they will resume living together; and

      (iii) six months after the first partner's death;

(b) in the case of unmarried spouses:

(i) two years after the spouses separate and there is no reasonable prospect that they will resume living together; and

(ii) six months after the first spouse's death. (at 67)

10. Section 19(2) of the *Family Law Act* should be amended to provide that a right to possession of the family home (see recommendation 13) terminates at the earliest of the date of divorce, two years after a Registered Domestic Partnership is terminated by revocation of the partnership, and two years after a separation where there is no reasonable prospect that the spouses or Registered Domestic Partners will resume living together, unless a separation agreement or court order provides otherwise. (at 67)

11. (1) Section 16(1) of the *Family Law Act* should be amended to provide that Part I of the Act applies to property owned by spouses:

(a) whether they became spouses, within the meaning of recommendations 1 and 6, before or after the effective date of the legislation by which the recommendations made in this report are implemented; and

(b) whether the property was acquired before or after that day.

(2) The principles of retroactivity embodied in section 70(1) of the *Family Law Act* should be applied with any necessary adjustments to its wording to the legislative changes recommended in this report. (at 68)

12. (1) The preamble and section 5(7) of the *Family Law Act* should be amended to replace the term "marriage" with the term "family relationship".

(2) The preamble to the *Family Law Act* should be further amended to provide as follows:

> Whereas it is desirable to *recognize and accommodate the diversity of family forms*; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within *family relationships* and to recognize *family relationships as equal partnerships*; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses

upon the breakdown of the partnership and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children; (at 68-69)

13. The *Family Law Act* should be amended to replace the term "matrimonial home" with the term "family home". (at 69)

14. The *Family Law Act* should be amended to replace the term "paternity agreement" with the term "parenting agreement". (at 69)

15. The *Family Law Act* should be amended to replace the term "dependant", as follows:

    (a) in Part III of the Act, with a term that has a neutral connotation, for example, the term "applicant"; and

    (b) in Part VI of the Act, in the title and marginal notes, with the term "family members". (at 69)

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